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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1631

DEMOCRATIC PARTY OF THE
UNITED STATES OF AMERICA and
DEMOCRATIC NATIONAL COMMITTEE,
Appellants,

v.

WISCONSIN ex rel. BRONSON C. LA FOLLETTE, and
DEMOCRATIC PARTY OF WISCONSIN,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

The Democratic Party of the United States of America and the Democratic National Committee ("National Democratic Party") appeal from the final judgment of the Supreme Court of Wisconsin declaring that Wisconsin's primary election statutes, which prohibit the Democratic Party from limiting participation in its candidate selection processes to Democrats, do not violate the Party's right of free political association guaranteed by the First and Fourteenth Amendments to the United States Constitution.

OPINION BELOW

The State of Wisconsin initiated this case as an original action before the Supreme Court of Wisconsin. The opinion of the Wisconsin court, which is reproduced in Appendix A, is reported at 93 Wis. 2d 473, 287 N.W.2d 519 (1980).

JURISDICTION

The Supreme Court of Wisconsin entered its judgment upholding the constitutionality of the open primary law on January 19, 1980. The National Democratic Party filed a Notice of Appeal in the Supreme Court of Wisconsin on March 13, 1980. App. A at 67a. This appeal is being docketed in this Court within 90 days from the final judgment of the Wisconsin court. The appellants invoke the jurisdiction of this Court under 28 U.S.C. § 1257(2).

QUESTION PRESENTED

The Wisconsin open primary law requires that delegates from Wisconsin at the 1980 Democratic National Convention vote for presidential candidates in proportion to the results of the open primary. The open primary law permits non-Democrats to vote in the Democratic primary. In contrast, the National Democratic Party allows only publicly declared Democrats to vote in binding primaries and other candidate selection processes. The Wisconsin Supreme Court declared that the statute bars the Democratic National Convention from refusing to seat the delegates from Wisconsin solely because the open primary results control their votes for the Party's nominee.

The question presented is: Whether, in light of the First and Fourteenth Amendments to the Constitution, *Cousins v. Wigoda,* 419 U.S. 477 (1975), and other decisions of this Court, the Supreme Court of Wisconsin correctly ruled that the

state statute could constitutionally prohibit the National Democratic Party from (1) enforcing its rules allowing only publicly declared Democrats to participate in choosing the Party's candidates, and (2) determining the qualifications and eligibility of delegates to the National Convention in accordance with its rules.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

The First and Fourteenth Amendments to the United States Constitution and relevant portions of the Delegate Selection Rules for the 1980 Democratic National Convention are set forth in Appendix B. The applicable Wisconsin primary election statutes, Wis. Stat. §§ 5.37(4); 5.60(8)(intro.),(c),(d); 8.12 (1977), are set forth in Appendix A, as an Appendix to the Wisconsin Supreme Court's opinion.

RAISING THE FEDERAL QUESTION

The appellants raised their constitutional claim at the earliest stages of this proceeding, in their answers to the complaint filed by the State of Wisconsin ("State") and the cross-claim filed by the Democratic Party of Wisconsin ("Wisconsin Party"). The National Democratic Party asserted that the relief sought by the State and the Wisconsin Democratic Party to enforce the open primary law against the National Party would violate the First and Fourteenth Amendments to the United States Constitution. The National Party reiterated its claim in its brief to the Wisconsin Supreme Court and in oral argument. The Wisconsin Supreme Court's order expressly considered and rejected appellants' claim.

STATEMENT OF THE CASE

The National Democratic Party's Delegate Selection Rules for the 1980 Convention, adopted on June 9, 1978, allow state parties to select delegates by primary, caucus, or convention.[1] Whichever method is used, participation in the process of determining the candidates for whom the delegates will be bound to vote must be limited to Democratic voters who publicly affiliate with the Party. Stipulations 6, 18.[2] Rule 2A of the Party's Delegate Selection Rules provides in part:

> Participation in the delegate selection process in primaries or caucuses shall be restricted to Democratic voters only who publicly declare their party preference and have that preference publicly recorded. . . .

The Rule's purpose is to allow only those who share the Party's political values and hopes for electoral success to influence the selection of its presidential and vice-presidential nominees. Years of study and experience convinced the Democratic Party that allowing Republicans and other non-Democrats to influence the choice of its presidential candidate impairs its efficacy as a political association.[3]

Rule 2A is an integral element of a set of rules that reflect over ten years of effort to reform the Party's process for selecting presidential candidates. Following the 1968 Convention, the Democratic Party determined to reform its nominating procedures to require state parties to open the Party's processes to full participation by Democratic voters and to

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[1] The 1980 Democratic National Convention will meet in New York City beginning August 11, 1980.

[2] The parties agreed to a Stipulation of Facts and to the authenticity of Exhibits 1 through 18.

[3] *See Kusper v. Pontikes,* 414 U.S. 51, 59 (1973); *Rosario v. Rockefeller,* 410 U.S. 752, 761 (1973).

assure that all Democrats are heard fully and fairly.[4] *Mandate for Reform, A Report of the Commission on Party Structure and Delegate Selection* 12 (1970). Exhibit 4. Each Party commission that studied the process proposed increasingly strong measures to ensure that participation in the nominating process would be limited to Democrats. Otherwise, the preferences of Republicans and other non-adherents would dilute the enhanced opportunities for Democrats to participate.[5]

The Party's post-1976 commission ("Winograd Commission") specifically found unacceptable open primaries such as Wisconsin's. There were indications "that the Republicans who crossover have different candidate preferences from the Democratic party identifiers in the electorate" and that crossovers could result "in a convention delegation which did not fairly reflect the division of preferences among Democratic identifiers in the electorate." *Openness, Participation and Party Building: Reforms for a Stronger Democratic Party* 68 (1978). Rule 2A, recommended by the Winograd Commission, thus restricts participation in the delegate selection process to Democratic voters who publicly affiliate with the Party.

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[4] From 1968 on, each Convention (the highest authority within the Democratic Party) directed the Democratic National Committee to establish a commission to study the presidential nominating process and to recommend procedures to achieve the Party's objectives. Among the procedures developed by successive commissions are rules requiring state parties to implement voter education programs, affirmative action plans aimed at traditionally underrepresented groups, and protections against closed slate-making activity.

[5] Each Commission made its recommendations to the Party in a report: *Mandate for Reform, A Report of the Commission on Party Structure and Delegate Selection* (1970); *Democrats All: A Report of the Commission on Delegate Selection and Party Structure* (1973); *Openness, Participation and Party Building: Reforms for a Stronger Democratic Party* (1978). Exhibits 2, 3, and 4 respectively.

The Wisconsin primary election statutes allow any voter to vote in the Democratic primary without regard to party affiliation. App. A at 2a, 23a-24a. At the open primary, each voter is given the ballots of all parties. While each voter may vote on only one ballot, the voter need give no public indication which party's ballot he marked. Republicans, independents, and other non-Democrats are allowed to vote in the Democratic primary and, hence, to influence the selection of the Democratic Party's presidential nominee. Although the delegates to the Democratic National Convention are chosen later at caucuses attended by Democrats, the statute requires that the votes of these delegates must be committed to presidential candidates in proportion to the votes cast in the open primary. Stipulations 18, 19.

On May 11, 1979, the Democratic Party of Wisconsin transmitted the Wisconsin Delegate Selection Plan for 1980 to the Party's Compliance Review Commission ("CRC").[6] Stipulation 13. The plan provides that delegates shall be allotted to candidates in proportion to the votes cast for the candidates in the State's open primary. The CRC found that this method violated Rule 2A's public affiliation requirement and on July 19, 1979, advised the Wisconsin Party that its Plan violated the Rules and the Call to the 1980 Convention.[7] Stipulations 14, 15. Because the Call requires that delegates be selected in accordance with the Delegate Selection Rules, compliance with Rule 2A is a condition to participation at the National Convention. Stipulation 11.

On August 29, 1979, the State of Wisconsin asked the Wisconsin Supreme Court for leave to commence an original action to enforce the open primary law against the Democratic

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[6] The CRC, which is a special party commission established under the Rules, reviews Delegate Selection Plans submitted by state parties and approves or requires changes in them. Stipulation 12.

[7] The Call formally establishes the date of the Convention, the qualifications for delegates, the Convention's procedures, and other rules essential to the conduct of the Convention. Stipulation 10.

Party. The State sought declaratory and injunctive relief, asking the court in part (1) to enjoin the National and Wisconsin Parties from implementing an alternate delegate selection system limited to publicly declared Democrats, and (2) to enjoin the National Party from refusing to seat Wisconsin delegates at the Convention because they were bound by the open primary.

After briefing and oral argument, the Wisconsin Supreme Court issued its declaratory judgment. The Wisconsin court declared that: the Wisconsin primary election statutes are constitutional and binding on the National Party; the vote in the open primary shall determine the apportionment among candidates of Wisconsin delegates to the Democratic National Convention; and the National Party shall not disqualify any delegates solely because they are bound by the open primary results. App. A at 42a.

The Wisconsin court assumed that the National Party has a constitutionally protected interest in ensuring that only Democrats participate in the selection of the Democratic candidate. It reasoned, however, that the open primary law did not substantially burden this interest. In the court's view, the method the Party had chosen to reach its objective — requiring public affiliation — was not "a necessary and effective way to prevent Republicans, adherents of other parties, and independents from voting on the Democratic Party ballot." App. A at 27a. Because the court believed the open primary statute fosters the objective of Rule 2A as effectively as the Party's rule, it found that the statute imposes no burden on the Party's protected interests. The court also said that, even if a burden exists, Wisconsin has a compelling interest in enforcing its statute. App. A at 36a, 42a.

The Attorney General of Wisconsin has indicated that he will seek to enjoin the Democratic Party from implementing

measures to select delegates in compliance with Rule 2A. *Wisconsin High Court Rules,* Wis. State J., January 20, 1980, at 1, col. 1; 2, col. 5.[8]

THE QUESTION IS SUBSTANTIAL

The question is substantial because the State has abridged a fundamental constitutional right of a national political party. It has interfered with the Party's ability to ensure that only its adherents participate in selecting its nominees. In the process the state statute impairs the National Party's efforts to shape a stronger, more responsive Democratic Party.

Further, because the Wisconsin court's order conflicts directly with this Court's decision in *Cousins v. Wigoda,* 419 U.S. 477 (1975), it seriously threatens the right of political parties to govern themselves. If left standing, the State's imposition of its own standard for participation in the Party's nominee selection process would encourage widespread state intrusion into parties' political functions. Indeed, others in Michigan and Montana have already initiated litigation challenging Rule 2A under similar state statutes.[9] Only action by this Court can clarify the First and Fourteenth Amendment rights of national political parties to establish and enforce their own nominee selection procedures.

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[8] Although the Wisconsin open primary was held on April 1, the Democratic Party under its rules could conduct an alternative delegate selection process, probably caucuses. The Party could conduct the process, which would be limited to publicly declared Democrats, before the Convention's opening on August 11. In any event, were this Court not to rule before the Party could implement an alternative process, the issue would arise again in connection with the 1984 nominating convention.

[9] *Ferency v. Austin,* No. G80-193 ca(5) (W.D. Mich., filed Mar. 27, 1980); *Jordan v. Democratic Party of the United States of America,* No. 80-0617 (D.D.C., filed Mar. 10, 1980).

1. The Wisconsin open primary law prevents the Democratic Party from allowing only publicly declared Democrats to participate in choosing the Party's candidates, in violation of the First and Fourteenth Amendments, *Cousins v. Wigoda*, and other decisions of this Court.

The Wisconsin open primary statute directly and severely abridges the Party's ability to exercise its fundamental right of free political association.[10] The Democratic Party's Rule allows only Democratic voters who publicly affiliate with the Party to participate in selecting its presidential candidate. The Wisconsin statute forces the Convention to seat delegates whose votes would reflect the candidate preferences of persons who are not publicly declared Democrats.

Prohibiting a national political party from allowing only party adherents to participate in its nominee selection process strikes at the core of the party's First Amendment right of free association. "Freedom of association would prove an empty guarantee if associations [referring to political parties] could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." L. Tribe, *American Constitutional Law* 791 (1978) (footnote omitted).[11] The statute's coercive effect—forcing the Party to accept the influences of Republicans and other non-Democrats—conflicts directly with the First and Fourteenth Amendments.

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[10] That political parties exercise fundamental First Amendment rights is well-established. *Williams v. Rhodes*, 393 U.S. 23, 32 (1968); *Sweezy v. New Hampshire*, 354 U.S. 234, 250-51 (1957); *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

[11] As the court of appeals said in *Rosario v. Rockefeller*:

> [T]he efficacy of the party system in the democratic process — its usefulness in providing a unity of divergent factions in an alliance for power — would be seriously impaired were members of one party entitled to interfere and participate in the opposite party's affairs.

Rosario v. Rockefeller, 458 F.2d 649, 652 (2d Cir. 1972), *aff'd*, 410 U.S. 752 (1973).

This Court has held that the national convention of a political party is the proper forum for determining disputes as to which delegates should be seated. *Cousins v. Wigoda,* 419 U.S. 477, 491 (1975); *O'Brien v. Brown,* 409 U.S. 1, 4 (1972). It has recognized that a state's intrusion into the convention's determination of the qualifications and eligibility of delegates violates the First and Fourteenth Amendment rights of a political party and its members.

In *Cousins,* this Court reversed the decision of an Illinois state court enjoining the seating of delegates selected in accordance with Party rules, rather than those selected in the Illinois primary election under state law. In the 1972 primary, the voters of Cook County, Illinois, elected a slate of delegates to the 1972 Convention which had been selected under procedures violating the Party's slatemaking guidelines.[12] The Party's Credentials Committee refused to seat the elected delegates and replaced them with a delegation chosen in post-primary caucuses that complied with the Party's rules. Shortly before the opening of the Convention, the Illinois Appellate Court affirmed an order of the Circuit Court of Cook County enjoining the delegates chosen in the caucuses from sitting as delegates to the Convention. 419 U.S. at 478-84.

This Court reversed, holding that Illinois' interest in protecting the integrity of its electoral process could not be sufficiently compelling to justify so serious an infringement on the Party's conduct of its nominee selection process. The Court recognized that a party's candidate selection process lies at the core of its constitutionally protected right to associate freely for political purposes. *Id.* at 487-88. The national conventions, the Court emphasized, not the states, have ultimate authority

[12] Under the Party's rules, state parties presenting slates to caucuses, conventions, or primary voters had to adopt rules which assured that the processes for selecting the slates were fair and open.

for selecting the Party's presidential and vice-presidential nominees.[13] All nine Justices in *Cousins* agreed that a state could not constitutionally compel the Convention to seat delegates against its will. See *id.* at 488; *id.* at 492 (Rehnquist, J., concurring); *id.* at 496 (Powell, J., concurring in part and dissenting in part). The Wisconsin Supreme Court's decision is directly and unquestionably inconsistent with this Court's decision in *Cousins v. Wigoda.*

The Wisconsin Supreme Court tried to distinguish *Cousins* on the ground that this case allegedly "does not arise 'in the context of the selection of delegates to the National Party Convention' or in the context of determining 'intra-party disputes as to which delegates [should] be seated.' " App. A at 42a (quoting *Cousins v. Wigoda,* 419 U.S. at 491). The statement totally ignores the Wisconsin court's own order, which effectively precludes the Convention from disqualifying certain delegates.

Delegate qualifications are directly involved. The procedures for determining which candidates the delegates are bound to support are crucial to the delegates' qualifications. The rules on delegate qualifications require that delegates be bound to vote for candidates at the Convention by processes in

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[13] Noting the danger of permitting each state to impose its own views regarding parties' delegate selection processes, the Court said:

> If the qualifications and eligibility of delegates to National Political Party Conventions were left to state law "each of the fifty states could establish the qualifications of its delegates to the various party conventions without regard to party policy, an obviously intolerable result." *Wigoda v. Cousins,* 342 F. Supp. 82, 86 (N.D. Ill. 1972).

419 U.S. at 490.

which only publicly affiliated Democrats participated.[14] Indeed, the Rules apply only to processes that bind delegates to vote for particular candidates: their purpose is to establish procedures for selecting the Party's candidate. Ten years of effort in developing the Rules would have little meaning if the Rules controlled nothing more than the selection of delegates bound to cast votes predetermined by another process.

Cousins also involved the Party's processes for selecting delegates bound to vote for particular candidates. Under the Illinois statute, delegates were committed to supporting particular candidates, and the primary voters determined the presidential candidate whom the delegates were bound to support. Ill. Rev. Stat. ch. 46, § 7-11 (1975). The Wisconsin open primary similarly determines the candidates whom the delegates must support, even though voters do not elect the delegates themselves. State interference with the procedures for selecting the Party's presidential candidate was the crucial issue in *Cousins* and is the crucial issue here.[15]

If this case differs from *Cousins*, it is because the Wisconsin statute infringes more severely on the Party's associational rights. In *Cousins*, the Illinois court enjoined the Cousins delegates from participating in the Convention. Conceivably,

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[14] The "Qualifications of State Delegations" established in the Call explicitly incorporate the Delegate Selection Rules, which provide that (1) a primary that binds delegates to the preferences of the primary voters is a part of the delegate selection process, (2) only publicly declared Democrats may participate in the process, and (3) the preferences of the Democrats participating must be fairly reflected in delegate strength. Exhibit 7 at 3 and 9, Rules 2 and 12.

[15] The dispute there also would have meant little if candidate selection were not involved. In fact, the controversy over whether to seat the Cousins or Wigoda delegates bore directly upon the outcome of the Party's selection of its presidential candidate. *See* Note, *Presidential Nominating Conventions: Party Rules, State Law, and the Constitution*, 62 Geo. L.J. 1621, 1629 n.36 (1974).

in the Court's view, the Convention could have refused to seat any Illinois delegates, and the Cousins delegates still would have been in compliance with the Illinois court's injunction. 419 U.S. at 488. Here, Wisconsin affirmatively requires the Convention to seat delegates reflecting candidate preferences of Republicans and other non-Democrats. As noted, all nine Justices in *Cousins* agreed a state could not coerce the Convention to seat delegates selected in violation of the Party's rules.[16]

2. Contrary to the Wisconsin court's view, the open primary law burdens the Party's exercise of its First Amendment right of political association, because it interferes with the Democratic Party's ability to choose the means to achieve its goals.

Although the Wisconsin Supreme Court accepted the principle that the Democratic Party has a protected interest in

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[16] The Wisconsin court's issuance of a declaratory order rather than an injunction does not lessen the severity of the infringement on the Party's associational rights. The declaratory order is an obvious attempt by the Wisconsin Supreme Court to circumvent *Cousins*. A declaratory order adjudicates rights and imposes a duty to obey. The practical effects flowing from declaratory and injunctive relief are virtually the same in this case. *See Samuels v. Mackell*, 401 U.S. 66, 72-73 (1971). Even if Wisconsin had specifically enjoined the Convention's disqualification of the Wisconsin delegates, that injunction would become enforceable only upon the eve of the Convention, the precise time that the declaratory judgment will become enforceable by a petition for supplemental relief. *See* Uniform Declaratory Judgments Act, Wis. Stat. § 806.04 (1977); *see also* Federal Declaratory Judgment Act, 28 U.S.C. § 2201 (1976); S. Rep. No. 1005, 73d Cong., 2d Sess. 2 (1934) (declaratory judgment differs from other judgments only because coercive enforcement does not automatically follow).

limiting participation in its candidate selection process to Democrats, app. A at 18a, it found that the open primary law does not impose a significant burden on the Party's exercise of that right. This is because, according to the Wisconsin Supreme Court, the statutory voting procedures screen out non-adherents as effectively as Rule 2A. The court's assertion not only misconceives the function of Rule 2A; it is also incorrect factually.

a. The open primary law abridges the Party's standard for who may participate in its candidate selection processes.

The open primary law defines the appropriate primary participants differently than Rule 2A. Rule 2A limits participation in Democratic candidate selection processes to those who publicly affiliate with the Party. The statute precludes it from doing so.[17] The statute directly abridges the Party's standard for who may participate.

The Wisconsin court erroneously implied that Rule 2A attempts to define "Democrats" as persons who declare publicly that they are Democrats and concluded that the open primary ballot procedures constitute a similar declaration, albeit one that is non-public. App. A at 19a-20a, 23a. Rule 2A, however, does not define "Democrats." Rather, it establishes a standard for participating in selecting the Democratic presidential candidate: namely, being a publicly affiliated Democrat.[18]

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[17] There can be no doubt that Rule 2A is calculated to achieve legitimate objectives. The Wisconsin court has acknowledged as much, as it had to. App. A at 22a-23a. In *Rosario v. Rockefeller*, 410 U.S. 752 (1973), this Court upheld a law far more restrictive than Rule 2A, because, like the Rule, the law was necessary to protect against dilution of the influence of party adherents.

[18] The Party's choice to require public affiliation to help limit the nominee selection process to those who share its objectives is a reasonable and responsible one. *See Rosario v. Rockefeller*, 458 F.2d 649, 653 (2d Cir. 1972), *aff'd*, 410 U.S. 752 (1973); L. Tribe,

(*footnote continues*)

As noted, the open primary law forces the Party to use a different standard for participation.

The State has unconstitutionally substituted its judgment as to the method of achieving the Party's objectives for that of the Party itself. An essential element of a political party's First and Fourteenth Amendment rights must include the right to organize and direct the party so as to be capable of effecting change through the political process. *Ripon Society, Inc. v. National Republican Party,* 525 F.2d 567, 585 (D.C. Cir. 1975), *cert. denied,* 424 U.S. 933 (1976). Time after time the courts have sustained a party's right to regulate its internal affairs—regarding membership, affiliation, and representation in party decisionmaking. *E.g., Cousins v. Wigoda,* 419 U.S. 477; *Ray v. Blair,* 343 U.S. 214 (1952); *Ripon Society, Inc. v. National Republican Party,* 525 F.2d 567; *Irish v. Democratic-Farmer-Labor Party of Minnesota,* 399 F.2d 119 (8th Cir. 1968).

The cases cited recognize the importance of allowing political parties the freedom of action necessary to promote their political goals in the manner they deem best. The decisions parties make in accomodating the varied interests of their adherents and in trying to achieve their goals reflect subtle

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(*footnote continued*)

American Constitutional Law 793 (1978). As one commentator has said:

> In support of the closed primary it is urged that party members should be willing to "stand up and be counted," that it prevents raids in terms of participation by members of other parties, and that it is impossible to develop party responsibility if nominations may be controlled by those with no continuing allegiance to the party . . . . The closed primary deserves preference because it is more readily compatible with the development of a responsible party system.

Committee on Political Parties, *Toward a More Responsible Two Party System,* 64 Am. Political Sci. Rev. 1, 71-72 (Supp. No. 3, pt. 2) (1950) (emphasis omitted).

political judgments and delicate balances of competing views. There are virtually no standards by which legislatures or judges can determine with certainty the political effectiveness of a particular choice of means to achieve a concededly valid objective. There may be room for disagreement, but "a party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests, deserves the *protection* of the Constitution...." *Ripon Society, Inc. v. National Republican Party,* 525 F.2d at 585 (emphasis in original). As the court said in *Ripon,* "it is the essence of the First Amendment rights, which the parties exercise, that they may make their own contrary (and rational) judgments without interference from the courts." *Id.* at 588.

More broadly, the Wisconsin court's view that there is no burden because the open primary is as effective as Rule 2A in limiting participation to Democrats conflicts with numerous other decisions of this Court. The Court has repeatedly stated that the exercise of First Amendment rights may not be abridged merely because there may be other means of exercising those rights. In *Spence v. Washington,* 418 U.S. 405 (1974), the state supreme court had found that the inhibition of the appellant's freedom of expression was " 'miniscule and trifling' " because there were " 'thousands of other means available to [him] for the dissemination of his personal views.' " *Id.* at 411 n.4 (citation omitted). This Court rejected that view summarily, observing that " 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' " *Id.* (quoting *Schneider v. New Jersey,* 308 U.S. 147, 163 (1939)). *Accord, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 757 n.15 (1976).

Contrary to the Wisconsin court's assertion, the statute's frustration of the Party's choice of means constitutes a serious infringement of protected associational rights. It disrupts the

process of party decisionmaking, seriously abridging the Party's right to govern its affairs. It unconstitutionally substitutes the State's rules for the Party's rules governing selection of its candidates.

b. Even if the State could substitute its judgment for the Party's, the Wisconsin court erred in concluding that the open primary law and Rule 2A are equally effective in precluding Republicans and other non-Democrats from influencing selection of the Democratic candidate.

Even if it were proper for the Wisconsin Supreme Court to assess the relative effectiveness of the open primary law and Rule 2A in screening out non-Democrats, the court had no support for the finding that both limit participation equally as well. The parties submitted the case on stipulated facts that did not address that question at all. While the Wisconsin court tried to build a case from extra-record secondary sources, the secondary materials are in conflict, at best.

The absence of a record to support this conclusion is particularly significant because, as the court acknowledged, Republicans and independents have voted in Wisconsin Democratic primaries. App. A at 25a. The Wisconsin court did not deny that the open primary law in fact permits Republicans and other non-Democrats to vote in the Democratic primary. Nothing in the statute actually prohibits Republicans and other non-Democrats from voting in the Democratic primary. The Wisconsin court's allusion to a statement of legislative intent is not to the contrary.[19] This generalized statement of legislative intent has never prevented Republicans from voting in the Democratic primary under the clear terms of the open primary law.

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[19] The "Wisconsin legislature has established the presidential preference primary to provide the opportunity for 'the voters of this state . . . to express their preference for the person to be the presidential candidate *of their party.*' Sec. 8.12(1) Stats." App. A at 23a (emphasis the court's).

Notably, Wisconsin's Attorney General believes that the state statute intentionally permits Republicans and other non-Democrats to participate in selecting the Democratic nominee. He argued that failure to uphold the open primary law over Rule 2A would frustrate the statute's policy of permitting any person to vote in any party's primary regardless of party allegiance. Memorandum in Support of Petition for Leave to Commence Original Action at 3. In the State's brief to the Wisconsin court, he said that "the Open Primary Law encourages the exercise of the associational freedoms of independents and Republicans who wish to vote in the Democratic primary in a particular year, as well as Democrats who wish to vote in the Republican primary." Brief and Appendix of Petitioner at 33. In fact, his view of the statute's intention and the court's recognition of its operation are consistent: the open primary law precludes the National Party from allowing only Democrats to participate in its candidate selection processes.

3. The State has no interest sufficiently compelling to justify the burden it places upon the Convention's ability to establish and pass upon the qualifications of its delegates.

a. The state interests underlying the open primary law are not compelling.

The Wisconsin court found that the State has a compelling interest in maintaining an open primary: "to preserve the overall integrity of the electoral process by providing secrecy of the ballot, thereby encouraging increased voter participation and ensuring that the primary ... [is] conducted in a fair and orderly manner." App. A at 30a. Yet, this Court held in *Cousins* that a state's interest "in protecting the integrity of its electoral process cannot be deemed compelling in the context of the selection of delegates to the National Party Convention.... '[T]he convention itself [was] the proper forum for determining intraparty disputes as to which delegates [should] be

seated.' " 419 U.S. at 491 (quoting *O'Brien v. Brown,* 409 U.S. 1, 4 (1972)). *Cousins* by itself should have been dispositive below on the compelling state interest issue.

The Wisconsin court also tried to identify several elements of the goal of "preserving the integrity of its electoral processes." They are: encouraging voter participation; protecting voters' "privacy of association," which avoids harassment of voters on account of their political affiliations; and protecting the "right to vote" in the Democratic presidential primary.

Specifically, the court asserted that participation may be reduced by the required declaration of affiliation. Without a record, there is no basis for the assertion that there is in fact greater participation in an open primary, as opposed to a primary limited to publicly affiliated voters. Indeed, while participation rates do not appear to be significantly related to type of primary, "turnout rates were higher in closed-primary states than in open-primary states." D. Ippolito & T. Walker, *Political Parties, Interest Groups, and Public Policy: Group Influence in American Politics* 195 (1980).

The Wisconsin court also cited no evidence of voter harassment either in Wisconsin or in the numerous states where state statutes require affiliation through registration on public rolls. *See Nader v. Schaffer,* 437 F. Supp. 837, 844 (D. Conn.), *aff'd mem.,* 429 U.S. 989 (1976). The State's bare assertion of an interest is insufficient to justify its infringement of the Party's First Amendment rights under the strict standard of scrutiny applicable here.

Finally, the Wisconsin court cited cases purportedly supporting its claim that the open primary statute preserves its citizens' "fundamental right to vote" in the presidential primary. App. A at 33a-35a. That assumes erroneously that Republicans have a "right" to influence the choice of the Democratic candidate. In any event, the respondents in *Cousins* relied upon the same cases. *See* Brief for Respondents at 25-31, *Cousins v. Wigoda,* 419 U.S. 477. This Court said in

response: "Consideration of the special function of delegates to such a [national party nominating] Convention militates persuasively against the conclusion that the asserted interest constitutes a compelling state interest." 419 U.S. at 489. *See Ripon Society, Inc. v. National Republican Party,* 525 F.2d 567, 588 (D.C. Cir. 1975), *cert. denied,* 424 U.S. 933 (1976).

b. The Wisconsin open primary statute fails to employ the least restrictive means available to achieve its asserted goals.

Even if the interests asserted by Wisconsin were "compelling," the statute does not use the least restrictive alternatives available for fostering those interests. Where a state burdens fundamental rights, "a heavy burden of justification is on the State" to show that the means chosen to advance its compelling interest are tailored to serve the state's interest and do not unnecessarily burden constitutionally protected activity. *Dunn v. Blumstein,* 405 U.S. 330, 342-43 (1972). If less burdensome, but reasonable, means are available, "a State may not choose the way of greater interference." *Id.* at 343.

The Wisconsin court asserted that the open primary law "encourages participation"; although, as noted, it had no evidence that a requirement of public party affiliation discourages participation. In any event, the State could use less restrictive means to encourage participation. For example, it could promote participation by educating voters or by improving the accessibility and convenience of polling places.

The open primary statute, the court said, protects voters from political harassment. But the State has plenary power to impose civil and criminal penalties for political harassment. None of the alternative means available to Wisconsin to deal with harassment would interfere with the Democratic Party's right to define those who may influence its nominating processes.

Wisconsin's assertion that the open primary law protects its citizens' "right to vote" ignores the fact that a closed-primary statute would also confer a right to vote, but without infringing upon the Party's rights. A declaration of affiliation raises no obstacle to the exercise of the franchise.

Despite this array of less drastic alternatives, the Wisconsin court concluded that the law "is drawn with the 'precision' required to pass constitutional tests." App. A at 32a. The court asserted that "[r]ecognizing that a private declaration of party preference rather than a public-recorded one might tempt some to cross over, the legislature has taken measures to reduce the temptation and to protect the party's associational interests." *Id.* But, as noted, the opinion fails to identify any such measures, other than the fact that the ballot procedures permit voting for only one party's candidates. The opinion nowhere explains how this prevents non-adherents from voting in the Democratic primary, as indeed it cannot.

In sum, Wisconsin has failed to demonstrate either a compelling interest in overriding the Party's exercise of its associational rights or the unavailability of less drastic means to advance whatever interest it may have. Under *Cousins v. Wigoda* and traditional First Amendment tests, Wisconsin's interest in the open primary statute must yield to the Democratic Party's vital right to freedom of political association.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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April 16, 1980

Appendices

APPENDIX A

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.*

No. 79-1328-OA
STATE OF WISCONSIN : IN SUPREME COURT
Filed January 19, 1980

**Clerk of
Supreme Court
Madison, Wisconsin**

STATE EX REL. BRONSON C. LA FOLLETTE,
Petitioner,

v.

DEMOCRATIC PARTY OF THE UNITED STATES OF AMERICA,

DEMOCRATIC NATIONAL COMMITTEE,

and

DEMOCRATIC PARTY OF WISCONSIN,
Respondents.

ORIGINAL ACTION for declaratory judgment and injunction commenced in this court pursuant to leave granted. *Rights declared.*

SHIRLEY S. ABRAHAMSON, J. On August 29, 1979, Attorney General Bronson C. La Follette filed a Petition for Leave to Commence an Original Action for Declaratory and Injunctive Relief in this court on behalf of the State of Wisconsin and the people of the state upon a request by the governor, pursuant to

* Appellants have reprinted the opinion of the Supreme Court of Wisconsin as originally circulated by that court. After this appendix was printed, the court's opinion was reported at 93 Wis. 2d 473, 287 N.W.2d 519 (1980).

sec. 165.25, Stats.[1] The named respondents, the Democratic Party of the United States of America (National Party), the Democratic National Committee (National Committee)[2] and the Democratic Party of Wisconsin (State Party) joined the Attorney General in requesting this court to take original jurisdiction. On September 12, 1979, the court granted the petition for leave to commence an original action. On September 28, 1979, the parties filed a stipulation of facts along with exhibits; briefs were filed by all parties and oral argument was heard on November 19, 1979.

The sole source of conflict between the petitioner and respondents is that the Wisconsin presidential preference primary is an open primary: The Wisconsin statutes permit voters to participate in the presidential preference primary without requiring them to publicly declare party preference. The National Party has stated that "the only Wisconsin delegation which will be seated [at the national convention] is one which complies with all of the National Party Rules including Rule 2A"[3] which requires that voters in the primary declare their preference for the Democratic Party and have that preference publicly recorded.

The Attorney General, joined by the State Party, argues that the Wisconsin law is constitutional and binding on the State and National Parties. The National Party maintains that the presidential preference primary (the open primary) permits non-Democratic voters to have a significant impact on the selection of a Democratic presidential candidate and that therefore the open primary violates its constitutionally guaranteed freedom to associate for political purposes.[4]

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[1] Sec. 165.25(1), Stats., provides: "The department of justice shall . . ., if requested by the governor or either branch of the legislature, appear for the state and prosecute or defend in any court or before any officer any cause or matter, civil or criminal, in which the state or the people thereof may be interested. . . ."

[2] We use "National Party" to include both the National Party and the National Committee.

[3] Stipulation of facts, par. 17.

[4] The first amendment to the federal constitution (applicable to this state by the fourteenth amendment) provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the

(footnote continues)

In deciding the issue presented, this court is called upon to balance overlapping and to some extent conflicting rights and interests: that of the National Party and its adherents to associate for the advancement of political beliefs, including the nomination of candidates for political office; that of Wisconsin citizens to cast their votes in the primary election, a significant step in the process of electing the President of the United States; that of Wisconsin citizens not to have their association with a political party a matter of public record; that of the state to protect and preserve the integrity of the nominating process and to conduct the primary, and political party participation therein, in a fair and orderly manner.

There is no simple test readily applicable for balancing these rights and interests or for determining which election laws are valid and which are invidious. Not every limitation or incidental burden on the right to associate or on the right to vote is unconstitutional. A state can substantially affect these rights where there is a sufficiently important state interest. Deciding the validity of election laws is, as the United States Supreme Court has said, "very much a 'matter of degree,' . . . very much a matter of [considering] the facts and circumstances behind the law, the interests which the state 'claims to be protecting and the interests of those who are disadvantaged. by the classification.'" *Storer v. Brown*, 415 U.S. 724, 729 (1973).

For over seventy-five years this state has conducted primary elections in the belief that the primary wrests the control

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(footnote continued)

freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Sec. 4, Art. I of the Wisconsin Constitution provides:

"The right of the people peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof, shall never be abridged."

The basis for freedom of association appears to be several constitutional guarantees, including the rights of free speech, free press, petition and assembly, vote. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958); Fellman, *The Constitutional Right of Association* 38 (1963); Note, *Freedom of Association and the Selection of Delegates to National Political Conventions*, 56 Cornell L.Rev. 148, 152-153 (1970).

over the selection of candidates from party bosses, caucuses and conventions and puts the control where it belongs—with the people of the state; and that the open presidential preference primary—compared to a closed primary—increases the opportunity of the citizens of this state to participate at a critical stage of the process of electing a President.

For the reasons we set forth below, we conclude that the open primary does not impose an unconstitutional burden on the associational rights of the National Party. The National Party has not presented a factual basis to support its assertion that the open primary significantly differs from a primary in which public declaration of party preference is required with regard to permitting those who do not share the National Party's values or goals to influence the selection of the Democratic candidate. Nor do we view the open primary law as an unconstitutional burden on the National Party's right to govern its affairs through the national convention. We determine that Wisconsin has a compelling state interest in not requiring that voters publicly declare their party preference and have that preference publicly recorded. Accordingly, we hold that the Wisconsin open primary law violates neither the state nor the federal constitution.[5]

We shall discuss in turn the Wisconsin election laws, the National Party's delegate selection rules and the conflict between the two; the historical background of the Wisconsin presidential preference vote; the National Party's claim that the open primary constitutes a substantial burden on its associational rights because non-Democratic voters significantly affect the selection of a Democratic Party candidate; and the state's compelling interest in its open primary law.

I.

We turn first to a brief discussion of the Wisconsin presidential preference vote, the National Party's delegate selection rules and the conflict between the two.

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[5] This court upheld the constitutionality of an open primary statute in *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 339, 125 N.W. 961 (1910).

A.

The Wisconsin legislature has enacted a comprehensive set of laws governing the election of national, state and local officers. Title II, Chs. 5-12, Stats. The laws in issue in this case relate to the presidential preference vote at the spring election, held on the first Tuesday in April in each year in which the electors for president and vice-president are to be elected. Secs. 5.02(21), 8.12(1)(intro.), Stats. The text of the applicable statutes are set forth in the appendix.

Through these statutory provisions, the legislature has detailed the exclusive manner for conducting a presidential preference primary in which "the voters of this state shall . . . be given an opportunity to express their preference for the person to be the presidential candidate *of their party.*" (Emphasis supplied.) Secs. 8.12, 5.62(1)(2), 5.60(8), 5.02(13), Stats. The manner by which the voters cast their votes for the candidate of their party is carefully prescribed by statute.

Where paper ballots are used, there is a separate presidential preference ballot for each party. Each voter is given the ballots of all parties participating in the presidential preference vote, and in the privacy of the voting booth, selects the ballot of the party of his choice, and indicates a choice for candidate on that ballot. Secs. 5.60(8), 10.02(3) (intro.), (a), (b) 2, 3, Stats. If the voter chooses not to vote for one of the candidates named on the ballot of his party, the voter may nominate another person by write-in vote or may vote against all the choices offered on the ballot of his party. Secs. 5.60(8) (intro.), (a), 10.02(3)(b) 3, Stats. The voter then detaches the chosen ballot from the remaining ballots and folds it so that its face is concealed and the printing and signatures or initials of the two ballot election clerks on the back of the ballot are visible. The voter folds the unmarked ballots in like manner. After leaving the voting booth, the voter delivers all the ballots to the voting inspectors; the one on which the voter has expressed a presidential preference is deposited in the ballot box, and the remaining ballots are deposited in the blank ballot

box. Secs. 5.60(8)(d), 10.02(3)(a) and (f), Stats. Immediately after the canvas the inspectors destroy the ballots deposited in the blank ballot box. Sec. 5.60(8)(e), Stats.

Where voting machines are used, all candidates' names entitled to appear on the ballots appear on the machine. The voter can vote for candidates of only one party. The voter makes the party choice in the privacy of the voting booth. Secs. 5.37(1), (4), 10.02(3) (intro.), (a), (b) 2, 3 and (f), Stats.

In order to vote in the primary the Wisconsin voter is not required to declare publicly a party preference or to have that preference publicly recorded. Each voter makes a choice of party in the privacy of the voting booth. It is this facet of the Wisconsin law, the "private declaration" of party preference in the voting booth as compared with a public, recorded declaration that characterizes the Wisconsin presidential preference vote as an "open primary."

Wisconsin voters do not select *delegates* to the National Party's national convention by means of the presidential preference primary. Delegates to the national convention are selected by the state party, not by the voters of the state. The Wisconsin statute explicitly states that "[t]he method of selecting the delegates or alternates shall be determined by the state party organization." Sec. 8.12(3)(b), Stats. The statute stipulates that not less than two-thirds of the convention votes be allotted to congressional districts and that these delegates and alternates be selected by the party organizations of each district. Sec. 8.12(3)(b), Stats.

The statute requires that each delegate file with the chairperson of the party a written declaration of acceptance, in the form of an affidavit, which states that the delegate "is affiliated with the political party which selected him as a delegate or alternate to its national political convention." Sec. 8.12(3)(c) 4, Stats. The State Party limits participation in the selection of delegates to the national convention to "persons who are willing to subscribe to the general principles of the Democratic Party and do so publicly by executing an appropriate statement to that effect."[6]

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[6] Brief of the Democratic Party of Wisconsin, Respondent and Cross-Claimant, at 9; Stipulation of facts, par. 19.

The convention delegates are bound for a limited period by the outcome of the presidential preference vote in their respective districts or by the outcome of the total presidential vote in the state at large. Sec. 8.12(3)(b), Stats. Each delegate must pledge (in the filed affidavit referred to earlier) to support the candidate to whom the delegate is bound and to vote for the candidate on the first ballot and on any additional ballot, unless the candidate dies or releases the delegate or until the candidate fails to receive at least one-third of the votes authorized to be cast. Thereafter the delegate's vote at the convention is based on personal preference. Sec. 8.12(3)(c) 5, Stats.

Thus the sole function of the Wisconsin presidential preference primary is to apportion the number of delegates among the presidential candidates on the ballot for that party. The process of selecting the convention delegates in Wisconsin is under the control and direction of the State Party.

B.

The National Party regulates the selection of delegates in its Charter, in its Delegate Selection Rules for the 1980 Democratic National Convention and in its Final Call for the 1980 Democratic National Convention. As the National Party points out in its brief, these documents reflect to a large extent the results of various studies made by the National Party beginning in 1968. Changes in the procedures for selecting national convention delegates were designed to give "all Democratic voters . . . a full, meaningful and timely opportunity to participate."[7]

Under the National Party's Rules, state parties may select their delegates to the national convention by primary, caucus or convention.[8] Whichever process is used by the state party, that

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[7] Delegate Selection Rules for the 1980 Democratic National Convention, Rules 2, 12; Stipulation of facts, par. 18.

[8] For a discussion of party reform and national political conventions, *see* Bickel, *Reform and Continuity, The Electoral College and Convention, and the Party System* (1971); Ranney, *Curing The Mischiefs of Faction* (1975); Segal, *Delegate Selection Standards:*

(footnote continues)

process must meet certain requirements prescribed by Charter and the Party Rules. Article 2, sec. 4, of the Charter states:

> "*The National Convention shall be composed of delegates who are chosen through processes which* (i) assure all Democratic voters full, timely and equal opportunity to participate and include affirmative action programs toward that end, (ii) assure that delegations fairly reflect the division of preferences expressed by those who participate in the Presidential nominating process, (iii) exclude the use of the unit rule at any level, (iv) do not deny participation for failure to pay a cost, fee or poll tax, (v) *restrict participation to Democrats only,* and (vi) begin within the calendar year of the Convention." (Emphasis supplied.)

Rule 2 of Delegate Selection Rules for the 1980 Convention (Party Rules) (June 9, 1978) regulates participation in the Delegate Selection Process as follows:

> "Rule 2 PARTICIPATION
>
> "A. *Participation in the delegate selection process in primaries or caucuses shall be restricted to Democratic voters only who publicly declare their party preference and have that preference publicly recorded.* Documentary evidence of a process which complies with this rule shall accompany all state Delegate Selection Plans upon their submission to the National Party. Such rules, when approved by the Compliance Review Commission and implemented shall constitute adequate provisions within the meaning of Section 9 of the 1972 Democratic National Convention mandate.[9]

(footnote continued)

The Democratic Party's Experience, 38 Geo.W.L.Rev. 873 (1970); *Mandate for Reform: A Report of the Commission on Party Structure and Delegate Selection to the Democratic National Committee* (1970) 9.

[9] Party Rule 2 in 1976 contained a provision which required public declaration of party preference. The 1976 Rules allowed exemptions from Rule 2 and the State Party obtained an exemption in 1976. Stipulation of facts, par. 16.

"B. A Rule 20 exemption shall not be granted from Rule 2A requirements.

"C. A State Party which is precluded by state statute from complying with this rule, shall adopt and implement an alternative party-run delegate selection system which complies with this rule.

"D. State Parties shall take all feasible steps to encourage non-affiliated and new voters to register or enroll as Democrats and to provide simple, easy procedures through which they may do so.

"E. No person shall be excluded from any stage of the delegate selection process for failure to pay a cost or fee." (Emphasis supplied.)

In the Final Call for the 1980 Democratic Convention (the Call),[10] adopted by the National Committee on May 25, 1979, the National Committee provides that "delegates and alternates to the 1980 Democratic National Convention shall be selected in accordance with the Delegate Selection Rules." The Party Rules established a Compliance Review Commission to "review . . . Delegate Selection Plans submitted by State Parties and approve or recommend changes in such plans." Rule 19(A).

C.

On May 11, 1979, the Chairman of the Wisconsin State Party sent the Wisconsin Delegate Selection Plan for 1980 (which incorporated the provisions of the Wisconsin open primary law) to the Compliance Review Commission.[11] On

[10] "The Call formally establishes the date of the Convention, the qualification for delegates, the Convention procedures, and other rules essential to the conduct of the Convention." Stipulation of facts, par. 10.

[11] At a hearing before the Compliance Review Commission on June 7, 1979, the State Party urged that the words "in the delegate selection process" in Rule 2A be interpreted as applicable to the actual process of selecting individuals to be delegates to the national

(footnote continues)

July 19, 1979, the Commission determined that the Wisconsin Delegate Selection Plan did not comply with the Party Rules and the Call because participation in the April 1, 1980 Wisconsin presidential preference primary is not restricted to Democratic voters who publicly declare their party preference and have that preference publicly recorded and because the State Party had not adopted and implemented an alternative delegate selection system.

The record does not disclose the present status of the State Party Plan with the Compliance Review Commission or the Credentials Committee. However, the State Party, the National Party and the Wisconsin legislature have set forth their positions: the State Party's administrative committee has resolved to "send a delegation to the 1980 National Convention in New York City selected in accordance with the results of the April 1, 1980 Wisconsin Presidential Preference Primary and chosen pursuant to rules and regulations issued by the Democratic National Committee and the Compliance Review Commission, except those rules and regulations which violate Wisconsin state law."[12] The National Party asserts that "a Wisconsin delegation which is apportioned to candidates on the basis of the results of the Wisconsin Open Primary will not be seated. The only Wisconsin delegation which will be seated is one which complies with all of the National Party's Rules including Rule 2A."[13] And the Wisconsin legislature has recently affirmed its commitment to maintaining Wisconsin's open primary law.[14]

(footnote continued)

convention and not applicable to a preference vote. The Commission refused to adopt this interpretation. Transcript of Hearing before Democratic National Committee Compliance Review Commission —1980, June 7, 1979. Exhibit 15, at 10-12, 19-20.

[12] Excerpt from Minutes of Meeting of Administrative Committee of Democratic Party of Wisconsin, September 29, 1979, Exhibit 18.

[13] Stipulation of facts, par. 17.

[14] An Enrolled Joint Resolution was adopted by the Wisconsin State Legislature on September 5, 1979, which reaffirmed "the firm and enduring commitment of the people of Wisconsin to the open presidential preference primary law as an integral element of Wisconsin's proud tradition of direct and effective participatory democracy and endors[ed] the actions taken by the attorney general to preserve and enforce the provisions of that law."

The sole source of conflict between the Wisconsin statutes and the Party Rules is that Wisconsin permits voters to participate in the presidential preference primary without publicly declaring party preference and having that preference publicly recorded. But for this feature of Wisconsin law there would be no dispute. There is no dispute as to who chooses convention delegates: the State Party does. There is no dispute as to whether the State Party may limit the delegate selection process to Democrats only; the State Party may and it does. There is no dispute whether delegates are bound by law to particular candidates; they are. The dispute centers on who may vote for presidential candidates in a primary.

Before we discuss the legal issues presented by this conflict, we will briefly discuss the historical background of the presidential preference primary. The conflict between state statutes and Party Rules arises because the primary serves both a Party and state function in the process of selecting candidates to represent the Party in the general election.

II.

From the time they originated in the 1790's until after the Civil War, American political parties were private voluntary associations which developed outside the government structure and without direct authorization in the federal or state constitution. In *Elrod v. Burns,* 427 U.S. 347, 369 (1976), the United States Supreme Court noted that "partisan politics bears the imprimatur only of tradition, not the Constitution."

During the country's early history, the party's candidates were generally chosen by party members in caucuses or conventions which were regulated by the party. The voters either prepared their own ballots for the general election or cast ballots prepared by a political party. The state established the time and place for the elections and established the qualifications for voting at the general election.

State regulation of political parties began for the most part in the 1890's and early 1900's when the states adopted the Australian ballot for the general election. Thereafter the ballot

was printed, distributed and counted entirely by public authorities and had the name of the candidate with the partisan affiliation printed next to the name. The ballot was to be marked in secret. When the states began printing ballots, they also devised methods for determining which candidates and which parties should be placed on the ballot.

In the first quarter of the 19th century presidential and vice-presidential candidates were nominated by a congressional caucus from each party. After the decline of the congressional caucus system, and beginning in the 1830's, presidential candidates were nominated by national conventions of state delegates chosen by state party caucuses or conventions.[15]

Robert M. La Follette, Sr., and the Wisconsin progressives were a major force in the 1900's urging legislative adoption of the primary election. The primary was aimed at stimulating popular participation in politics thereby ending boss rule, corruption, and fraudulent practices which were perceived to be part of the party caucus or convention system. Robert M. La Follette, Sr., supported the primary because he believed that citizens should nominate the party candidates; that the citizens, not the party bosses, could control the party by controlling the candidate selection process; and that the candidate and public officials would be more directly responsible to the citizens.[16] Robert M. La Follette, Sr., called for the adoption of the primary, arguing that:

> "No longer . . . will there stand between the voter and the official a political machine with a complicated system of caucuses and conventions, by the easy manipulation of which it thwarts the will of the voter and rules official conduct. . . . If the voter is competent to cast his ballot at

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[15] Ranney, *Curing the Mischiefs of Faction* 13-15, 78-80 (1975); Ranney & Kendall, *Democracy and the America Party System* 274-277 (1956); Dallinger, *Nominations for Elective Office in the United States* (1897); Goodman, *The Two-Party System in The United States* (3d ed. 1964); Key, *Politics, Parties and Pressure Groups* 687-691 (4th ed. 1958).

[16] Ranney, *Curing the Mischiefs of Faction* 18, 80, 119-122, 124-126 (1975).

> the general election for the official of his choice, he is equally competent to vote directly at the primary election for the nomination of the candidates of his party. . . ."[17]

Wisconsin adopted an open primary law for partisan offices in 1903 (Laws of 1903, Ch. 451), and the law was amended in 1905 to apply to the selection of national convention delegates (Laws of 1905, Ch. 369). Although the Wisconsin primary law has been modified in several respects, for approximately seventy-five years this state has conducted open primaries for president and for state and partisan offices.[18]

Beginning in the early 1900's, state legislatures across the country adopted the state-administered primary election for directly or indirectly selecting party candidates.[19] Now approximately 30 states have enacted a presidential primary procedure.[20] The significance of the presidential primaries in select-

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[17] Speech Accepting Nomination for Governor, August 8, 1900, in Torelle, *La Follette's Political Philosophy* 36-37 (1920).

Robert M. La Follette and the primary in Wisconsin are discussed in Lovejoy, *La Follette and the Establishment of the Direct Primary in Wisconsin—1890-1904* (1941); and Katz, *The Direct Primary and Party Responsibility in Madison* (B.A. Thesis, U.W. 1923).

[18] A brief description of the history of the Wisconsin presidential primary law appears in Wisconsin Legislative Reference Bureau, *The Wisconsin Presidential Primary: Open or Closed?* Research Bulletin 75—RB—1, 5-8 (1975) and Wisconsin Legislative Reference Bureau, *The Selection of a President in the United States; with Particular Reference to Wisconsin* (April 1960).

Robert M. La Follette, Sr., envisioned a closed primary and the early bills in Wisconsin proposed a closed primary law. However, "[t]here is no indication that La Follette was upset about the enactment of an open rather than a closed primary. In his autobiography, he wrote that except for the lack of a provision to allow voters to indicate their second choice on the ballot, 'I think it is the most perfect law for the nomination of candidates by direct vote ever enacted.'" Wisconsin Legislative Reference Bureau, *The Wisconsin Presidential Primary: Open or Closed?* 6-7.

[19] Ranney, *Curing the Mischiefs of Faction* 81, 122-123 (1975); Goodman, *The Two-Party System in the United States*, 135-136 (3d ed. 1964).

[20] Wisconsin Legislative Reference Bureau, *The Wisconsin Presidential Primary: Open or Closed?* 11.

ing the presidential candidate is readily apparent; the primary results determine over 70 percent of the convention votes.[21]

Because the primaries are governed by state law, there is considerable variance in the primary process from state to state. In some states voters cast ballots for delegates to national party conventions; in other states voters indicate their preference for presidential candidates. Most state statutes prescribe a "closed primary," that is, participation is restricted to voters who in some manner and at some time prior to voting, publicly declare their affiliation with a political party and have that affiliation recorded. In a few states, including Wisconsin, the legislatures have established an "open primary," that is, the voters are not required to state publicly a party preference. The open and closed primaries are alike in that a voter can vote in the primary of only one party. Goodman, *The Two-Party System in the United States,* 128-133 (3d ed. 1964).

Today most states regulate the methods by which political parties select candidates for state and local office and select delegates to the national conventions.[22] The political parties in this country are in the anomalous position of having one of their functions—nomination of their candidates—governed by the states as an integral part of the comprehensive state-regulated election system. The United States Supreme Court has noted:

> "[T]he States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates." *Storer v. Brown,* 415 U.S. 724, 729-730 (1974).

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[21] Ranney, *The Federalization of Presidential Primaries* 2 (1978).

[22] For a description of the state procedures, *see Nomination and Election of the President and Vice-President of the United States —Including the Manner of Selecting Delegates to National Political Convention* (Congress'l Res. Serv., Library of Congress, U.S. Govt. 1976).

This brief summary of the development of the presidential primary demonstrates that both the state and the political parties have been and are deeply involved in the process by which party candidates are selected. Because both the state and the political party function in this process, conflict between the two is inevitable. Goodman, *The Two-Party System in the United States* 128 (3d ed. 1964). Political parties, because of their integral involvement in the election process, are not typical, purely voluntary association.

III.

The National Party and its adherents have a constitutionally protected right of political association, but the state law may circumscribe that right. The critical question is whether the circumscription can pass constitutional muster. The answer depends on an analysis of the right claimed, the nature and scope of the limitation and whether there is a sufficient state interest to justify the limitation.[23]

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[23] There is extensive law review comment on the regulation of elections and political parties, *see, e.g.*, Kester, *Constitutional Restrictions on Political Parties,* 60 Va.L.Rev. 735 (1974); Vining, *Delegate Selection Reform and the Extension of Law into Politics,* 60 Va. L.Rev. 1389 (1974); Raymar, *Judicial Review of Credentials Contests: The Experience of the 1972 Democratic National Convention,* 42 Geo. W.L.Rev. 1 (1973); Skornicka, *State Action in Presidential Candidate Selection,* 1976 Wis.L.Rev. 1269; *Developments in the Law—Elections,* 88 Harv.L.Rev. 1111 (1975); Note, *The Constitutionality of Non-Member Voting in Political Party Primary Elections,* 14 Willamette L.J. 259 (1978); Comment, *Open Versus Closed Primaries: A Dilemma in the Illinois Election Process,* 1977 So. Ill. U.L.Rev. 210 (1977); Note, *Judicial Intervention in Political Party Disputes: The Political Thicket Reconsidered,* 22 U.C.L.A. L.Rev. 624 (1975); Note, *Primary Elections: The Real Party in Interest,* 27 Rutgers L.Rev. 298 (1974); Note, *Presidential Nominating Conventions: Party Rules, State Law, and the Constitution,* 62 Geo. L.J. 1621 (1974); Note, *Mandates of the National Political Party Clash With Interests of the Individual States as the Party Executes Its Policy By Abolition of State Delegate Selection Results: Legal Issues of the 1972 Democratic Convention and Beyond,* 4 Loyola U.L.J. 136 (1973); Note, *The Right to Vote and Restrictions on Crossover Primaries,* 40 U. Chi. L.Rev. 636 (1973); Note, *Judicial Intervention*

(footnote continues)

In *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975), Mr. Justice Brennan, writing for the majority, described the protected rights of the National Party and adherents as follows:

> "The National Democratic Party and its adherents enjoy a constitutionally protected right of political association. 'There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of "orderly group activity" protected by the First and Fourteenth Amendments. . . . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom.' *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973). 'And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States.' *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968). Moreover, '[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.' *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); see *NAACP v. Button*, 371 U.S. 415, 431 (1963)."

Mr. Justice Rehnquist, joined by the Chief Justice and Mr. Justice Stewart, also recognized the constitutionally protected right of freedom of association of members of a political party.

> "We agree with the Court that the members of political parties enjoy a constitutionally protected right of freedom of association secured by the First and Fourteenth Amendments to the United States Constitution. The right of members of a political party to gather in a national political convention in order to formulate proposed pro-

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(footnote continued)

in the Presidential Candidate Selection Process: One Step Backwards, 47 N.Y.U. L. Rev. 1184 (1972); Note, *Freedom of Association and the Selection of Delegates to National Political Conventions*, 56 Cornell L.Rev. 148 (1970); Note, *One Man, One Vote and Selection of Delegates to National Nominating Conventions*, 37 U. of Chi. L.Rev. 536 (1970); Note, *Constitutional Safeguards in the Selection of Delegates to Presidential Nominating Conventions*, 78 Yale L.J. 1228 (1969).

grams and nominate candidates for political office is at the very heart of the freedom of assembly and association which has been established in earlier cases decided by the Court. *NAACP v. Alabama,* 357 U.S. 449 (1958); *Bates v. Little Rock,* 361 U.S. 516, 523 (1960); *Healy v. James,* 408 U.S. 169 (1972)." *Cousins v. Wigoda,* 419 U.S. 477, 491 (1975).

The National Party describes the right of political association involved in this case as the right to have only Democratic voters participate in selecting the Democratic candidate for President. The National Party asserts that it has prescribed Rule 2A which identifies Democratic voters; that the Wisconsin's open primary law conflicts with the Party rule; and that requiring Wisconsin delegates to be apportioned among the presidential candidates according to the results of the Wisconsin presidential preference primary forces the National Party "to accept the votes of non-adherents in choosing its candidates [which] is a direct, severe, and fundamental infringement on First Amendment activity. . . . [R]equiring a political party to permit those who do not share its political values or goals for electoral victory to influence its selection of candidates would strike at the heart of the political freedom of what is the hallmark of a free and open society."[24]

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[24] Brief of Respondents, Democratic Party of the United States of America and Democratic National Convention, at 17. The brief identifies these "non-adherents" as "Republicans, adherents of other parties, and independents."

The National Party does not assert that it has an interest in acquiring a list of Democratic voters for campaign purposes. The United States District Court for the District of Connecticut in *Nader v. Schaffer,* 417 F.Supp. 837, 848 (1976), *aff'd without opinion,* 429 U.S. 989 (1976), said:

> "From the party's point of view, enrollment also serves an important housekeeping function. Candidates need to know who is in the electorate, so that they (the candidates) can attempt to persuade those individuals to vote for them. Party members who wish to establish, as party policy, a particular course of conduct through the election of a particular candidate, similarly need to know who their supporters are. It is common experience that direct solicitation of party members—by mail, telephone, or face-to-face contact, and by the candidates themselves or by

(footnote continues)

Although conceding in principle that the state may regulate it in some respects and that its associational rights are subject to limitations, the National Party asserts that this court may not examine the associational objectives of Rule 2A; that this court may not examine the extent to which the state statute actually interferes with the objectives of Rule 2A or with the Party's associational interests; and that this court may not determine whether the Wisconsin open primary law in fact requires the National Party to permit those who do not share its political values to influence its selection of candidates.

We do not adopt the National Party's view which appears to be that only it may determine who may vote on the Democratic ballot in the primary and that the open primary law constitutes a substantial burden on associational rights merely because it conflicts with a National Party Rule. The National Party has the duty of persuading us that this is a situation in which a state statute significantly infringes the National Party's associational rights. *Marchioro v. Chaney,* U.S. , 99 S.Ct. 2243, 2248 (1979). *See also, American Party of Texas v. White,* 415 U.S. 767, 790 (1974). The discussion of substantial burden in this case must focus on whether the open primary law significantly impedes the National Party as it seeks to achieve its stated purposes and objectives.

For the purposes of determining whether the Party's associational rights have been burdened, we accept the National Party's assertion that it has a protected associational interest in ensuring that only Democratic voters participate in selecting the Democratic presidential candidate. We recognize that the primary is a step in the process of selecting a candidate who will be the Party's standard bearer: that the primary is a substitute for closed slate-making by party leaders; and that although the primary broadens participation in slate-making, the primary election remains to some extent a party function. The National Party asserts that selecting the candidate for its ticket is its

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(footnote continued)

> their active supporters—is part of any primary election campaign. But, without the public list of party members which is provided by the enrollment process, such electioneering would become quite difficult. . . ."

business, that it is in the general election, not in the primary, that candidates of all parties seek votes from the entire electorate, and that the entire electorate enjoys the freedom to vote for the party's nominees.

We must keep in mind, however, that the primary cannot be viewed simply as an election process of a private association. The primary serves an important public function. The primary involved in this case is part of the electoral process for electing the President of the United States. Thus both the state and the party have an interest in protecting the integrity of the primary. The party is interested in protecting the integrity of the primary as a party function and protecting its associational interests "from intrusion by those with adverse political principles." *Ray v. Blair,* 343 U.S. 214, 221-22 (1952). The state has a legitimate interest in protecting the overall integrity of the primary and the electoral process. This interest includes protecting the associational rights of the party; protecting the rights of its citizens to vote, to associate for political purposes, and to not disclose their party preference; and ensuring that the primary itself and political party participation therein are conducted in a fair and orderly manner.

The National Party in its brief repeatedly asserts that the Wisconsin primary significantly infringes on its associational rights by allowing "Republicans, adherents of other parties, and independents" to vote on the Democratic party ballot. By implication the Party is saying that it does not want these people to participate because they do not have a commonality of interest with Democratic voters and that these people are excluded from participation under Rule 2A which defines Democratic voters as those persons "who publicly declare their party preference Democratic and have that preference publicly recorded."

Under Rule 2A voters are Democratic voters if they think they are and they say they are. The National Party does not set forth any objective standards against which a voter may test his or her self-designation or against which anyone else may test the voter's designation. Nor does the National Party set forth any subjective standards to guide voters in determining their party preference. We could find no explanation by the

National Party of who is a Democratic voter for purposes of voting in the primary except that a Democratic voter is a person who makes a declaration of Democratic party preference at the time of voting. We could find no explanation of what the declaration is supposed to signify or of what the voters are committing themselves to in making this declaration.

Defining who is and who is not a Republican or Democrat, defining the commonality of interest which binds Democrats or Republicans, or defining the Republican's or Democrat's commitment to the party are key issues which have not, as far as we can tell, been resolved by the parties.[25] The significance of the declaration of preference is far from clear. There are indications that in closed primary states eligible voters do not participate in primaries because they do not understand the "party identification" requirements.[26]

The National Party intended to make it easy for people to be Democratic voters and to participate in selecting the Democratic candidate. The documents relating to the National Party's reform efforts state that a guiding principle is that "opportunity to participate in the delegate selection process must be open to all persons who wish to be Democrats and who

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[25] In a discussion of state parties and the presidential primaries, a Commission of the National Party recognized that there are various definitions of party and party membership. Possible definitions discussed included: "identifiers in the electorate" and "the on-going organization of political activists who consistently work for the party". Report of the Commission on Presidential Nomination and Party Structure (Winograd, Commission Report), *Openness, Participation and Party Building: Reforms for a Stronger Democratic Party,* 25-26 (1978).

Ranney describes four American conceptions of party membership: Party regulars, Candidate and Issue Enthusiasts, Self-designated Adherents, Any and All Voters. Ranney, *Curing the Mischiefs of Faction* 150-170.

Different definitions of who is a Democrat or a Republican have been proposed depending on the stage in the electoral process and the level of involvement, such as primary election, general election, caucus, convention, apportionment of delegates to each state by the national parties, and candidacy.

[26] *Developments—Election Law,* 88 Har. L.Rev. 1111, 1165 (1975).

are not already members of another political party."[27] The Party Rules (Rule 2D) encourage state parties to take all feasible steps to encourage non-affiliated and new voters to register or enroll as Democrats and to provide simple, easy procedures through which they may do so.

On June 23, 1975, Wisconsin Governor Patrick J. Lucey, a Democrat, proposed an amendment to the open primary law which apparently encompassed his interpretion of Rule 2A in the 1976 Convention. The Governor's proposal for the declaration of preference provided:

> "Each elector wishing to cast a ballot in the presidential preference vote shall be required to sign a statement in the following form:
>
> " 'For the purposes of voting in the (*year*) Wisconsin presidential preference vote, I hereby state my party preference to be (*Democratic*) (*Republican*) (*American*). It is understood that my party preference does not necessarily indicate an affiliation with or membership in the party, but only a preference for voting purposes in this particular election.' "[28]

It appears reasonable to interpret the voter's declaration of Democratic party preference under Rule 2A as equivalent to the voter stating that at the time of voting in the presidential primary the voter is not an adherent of or loyal to a political party other than the Democratic party and that at the time of the primary the voter prefers the Democratic party and supports it because the party presents candidates, issues, or philosophies with which the voter identifies.[29] This statement of the

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[27] *Mandate for Reform: A Report of the Commission on Party Structure and Delegate Selection to the Democratic National Committee* (1970), Guideline C-3, at 47.

[28] Public hearing before Assembly Committee on Elections on June 23, 1975, quoted in Wisconsin Legislative Reference Bureau, *The Wisconsin Presidential Primary: Open or Closed?* 4.

[29] *See also, Developments—Election Law,* 88 Harv. L.Rev. 1111, 1167 (1975): "What the party members generally share—what their affiliation declaration symbolizes—is a present intention to support party nominees at the general election and in succeeding elections, and a commitment to the party as an ongoing body and to the party's basic political beliefs."

commonality of interest of those voting on the Democratic Party ballot is consistent with the principles of the Party's reform effort.

The United States Supreme Court has described the associational interests of voters in a partisan primary as:

> ". . . Under our political system, a basic function of a political party is to select the candidates for public office to be offered to the voters at general elections. A prime objective of most voters in associating themselves with a particular party must surely be to gain a voice in that selection process. By preventing the appellee from participating at all in Democratic primary elections during the statutory period, the Illinois statute deprived her of any voice in choosing the party's candidates, and thus substantially abridged her ability to associate effectively with the *party of her choice.*" *Kusper v. Pontikes,* 414 U.S. at 58. (Emphasis supplied)[30]

Justice Powell similarly viewed the commonality of interests of voters in a primary election:

> "Political parties in this country traditionally have been characterized by a fluidity and overlap of philosophy and membership. And citizens generally declare or alter party affiliation for reasons quite unconnected with any premeditated intention to disrupt or frustrate the plans of a party with which they are not in sympathy. Citizens customarily choose a party and vote in the primary simply because it presents candidates and issues more responsive to their immediate concerns and aspirations. . . . That a citizen should be absolutely precluded so far in advance from voting in a party primary in response to a sympathetic candidate, a new or meaningful issue, or changing party philosophies in his State, runs contrary to the fundamental rights of personal choice and expression

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[30] Note the language in sec. 8.12(1), Stats., which provides that the voters express their preference for the person to be the candidate "of their party."

which voting in this country was designed to serve." *Rosario v. Rockefeller*, 410 U.S. 752, 769, 770, 771 (1973) (J. Powell dissenting).

The Wisconsin presidential preference primary law protects the same commonality of interest of primary election voters as does Rule 2A. The Wisconsin legislature has established the presidential preference primary to provide the opportunity for "the voters of this state . . . to express their preference for the person to be the presidential candidate *of their party.*" Sec. 8.12(1), Stats. Although the statute does not require a public declaration of party preference, the legislative intent is clear that the voters should vote only on the ballot of the party they claim as theirs and that they will not vote on the ballot of a party with which they do not identify. Indeed, the legislature has taken steps to encourage voters to participate in the primary of their party and to discourage a voter of one party from being tempted to vote in the primary of another party. Limiting voters to only one party's ballot discourages voters from voting on a ballot of a party other than their own, because in order to do so they would have to sacrifice their opportunity to participate in their own party's selection process. The presidential preference primary ballot lists the candidates and also includes space for a write-in vote and for a vote against all the candidates offered by that party. When voters mark the ballot "None of the names shown" they are expressing a preference for an uninstructed delegation. Sec. 5.60(8)(intro.), (a), 10.02 (3) (b) 3, Stats. This latter provision was inserted by the legislature "in order to reduce the temptation of cross-over voting." Ch. 90, Laws of 1967, Analysis by the Legislative Reference Bureau, par. 3.

Thus it appears that the National Party and the Wisconsin legislature have similarly identified those who may vote on the Democratic Party ballot.

Under both the Party Rule and the Wisconsin statute the voters designate themselves as Democratic voters using subjective standards; the designation cannot be challenged. Those who seek to vote in the Democratic Party primary will do so because they identify with the commonality of interests which they perceive they share with the party. Under both the Party

Rule and the statute the voters associate with the party presenting "candidates and issues more responsive to their immediate concerns." *Rosario v. Rockefeller,* 410 U.S. 752, 770 (1973) (Powell, J. dissenting).

Because under both the Party Rule and the Wisconsin statutes only those voters whose party preference in that primary is Democratic are expected to vote on the Democratic Party ballot, the question then becomes whether Wisconsin's failure to require the public-recorded declaration of Democratic Party preference has a significantly different effect than Rule 2A on excluding "Republicans, independents and others" from voting in the primary.

The National Party's contention that a contemporaneous publicly recorded statement of party preference is necessary to maintain the integrity of associational rights is attenuated by its dependence on two unsupported assumptions: first, that voters who do not have a commonality of interest with the Party will attempt to vote on the Party ballot in sufficient numbers to jeopardize the primary's integrity; and second, that a contemporaneous declaration of party preference is a necessary and effective way of preventing this result.

There are three categories of voters identified by the National Party as not having a commonality of interest with it. One category consists of the raiders. "Raiding" has been defined by the United States Supreme Court as "the practice whereby voters in sympathy with one party vote in another's primary in order to distort that party's results." *Kusper v. Pontikes,* 414 U.S. 51, 59 (1973). Raiding is an act hostile to the party; it amounts to a fraud on the party. It deprives the party and its members of the purpose of their association. The petitioner and respondents agree that raiding is not a significant problem and that neither the Wisconsin open primary nor the declaration required by Rule 2A prevents "raiding."[31] Rule 2A

[31] Raiding is not a serious threat. *See* materials cited in Note, *The Constitutionality of Non-Member Voting in Political Primary Elections,* 14 Willamette L.J. 259, 282-286 (1978); Adamany, Communication: *Cross-Over Voting and the Democratic Party's Reform Rules,* 70 Am. Pol. Sci. Rev. 536, 538 (1976); Ranney, *Turnout and*

(footnote continues)

is not designed to inhibit raiding.[32]

A second category of voters who the National Party views as not having a commonality of interest with it are Republicans or adherents of other parties. Apparently the National Party adopted Rule 2A to prevent Republicans from voting on the Democratic Party ballot. Political science research studies which the National Party cites indicate that Wisconsin Republicans voted on the 1968 Democratic Wisconsin primary ballot. They were not hostile; they were not attempting to harm the Democratic Party. They:

> "deserted their party to register their special approval of a candidate, or a policy associated with a candidate, available only in the other party. [Eugene] McCarthy's Republican supporters clearly did not vote for him because they thought he would be the easiest Democrat for Nixon to beat in November; they did so because they liked him and his opposition to the Vietnam war."[33]

Studies of the Wisconsin open primary indicate that a small percentage of the total primary voters were persons who chose to vote in the other party's primary.[34] Although studies of Wisconsin primaries demonstrate that the statewide result of the primary election has not been affected by Republican cross-

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Representation in Presidential Primary Elections, 66 Amer. Pol. Sci. Rev. 35-36 (1972); Note, *Primary Electons: The Real Party in Interest,* 27 Rutgers L.Rev. 298, 307 n. 74 (1974); *Developments in the Law—Elections,* 88 Harv. L.Rev. 1111, 1172-1173 (1975); Note, *Constitutional Issues in Durational Party Affiliation Requirements,* 25 Maine L.Rev. 147, 154 (1973).

In *State ex rel. Van Alstine v. Frear,* 142 Wis. 320, 342, 125 N.W. 961 (1910), this court commented on raiding as follows: "That any considerable following of one political creed will deliberately desert their own party at the primary to foist an unworthy set of candidates on a rival party presupposes a degree of moral turpitude that we cannot presume to exist."

[32] Winograd Commission Report 68.

[33] *Id.,* quoting from Ranney, *Turnout and Representation in Presidential Primary Elections,* 66 Amer. Pol. Sci. Rev. 35 (1972).

[34] Hedlund, *Cross-Over Voting in a 1976 Open Presidential Primary,* 41 Pub.L.Q. 498, 502, 513 (19).

over voting, the National Party was concerned that the Wisconsin open primary law might enhance the possibility that a Democratic candidate might be chosen by Republicans who "have different candidate preferences from the Democratic Party identifiers in the electorate."[35] Significantly, the studies relied upon by the National Party show that primary voters nationwide are not representative of rank and file Democrats.[36] Primary voters tend to be people with higher socio-economic and educational backgrounds than rank and file Democrats. The National Party report concluded that on a national basis "demographically, the 1976 [primary] electorate is as unrepresentative of Democratic Party identifiers as previous primary electorates."[37] As to caucuses limited to "Democrats only," which the National Party permits in lieu of primaries, the National Party concluded that caucuses were similar to primaries in that "rank and file participation in the nominating process has invariably been demographically unrepresentative of the Democratic rank and file."[38] The National Party's own materials indicate that Wisconsin's open primary produces an electorate which is as representative (or as unrepresentative) of "Democratic identifiers in the electorate" as is the electorate produced by closed primaries and caucuses which are acceptable to the National Party.[39]

The National Party's brief identified "independents" as a third category of voters who do not have a commonality of interest with the party.[40] The party materials submitted on

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[35] Winograd Commission Report 68, referring to Adamany, *Cross-Over Voting and The Democratic Party's Reform Rules,* Amer. Pol. Sci. Rev. (1976). *See also,* Hedlund, *Cross-Over Voting in a 1976 Open Presidential Primary,* 41 Pub.L.Q. 498, 502-503 (19).

[36] Winograd Commission Report 10-15.

[37] *Id.,* 14.

[38] *Id.,* 15. In addition, the Winograd Commission found that:

> "Data on caucus participants show that there are far fewer caucus participants than primary voters. In 1976, some 3.9% of the eligible persons participated in the caucus system; this was less than one-tenth the participation rate of the primaries." *Id.*

[39] Winograd Commission Report 10-14.

[40] The United States Supreme Court, in reviewing the validity of limitations on voting rights in primary elections, has considered the

(footnote continues)

Rule 2A do not refer to the need to screen out participation by independents. The declaration of preference required by Rule 2A appears to be no more effective than the open primary in deterring the participation of independent voters. Also, studies suggest that in closed primary systems, voters who consider themselves independents enroll or register as party members to vote in the primary of their choice.[41]

As is evident from the discussion, we have not been presented with any factual basis to support the National Party's position that under the open primary statute, "Republicans, adherents of other parties, and independents would significantly affect the selection of the Democratic candidates."

Nor has the Party shown that the contemporaneous declaration of party preference is a necessary and effective way to prevent Republicans, adherents of other parties, and independents from voting on the Democratic Party ballot. Although some political theorists tend to support requiring a declaration of party affiliation to vote in a primary,[42] it is generally

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state interest to be that of preserving the integrity of the election by protecting the party against raiders (hostile voters). *Rosario v. Rockefeller,* 410 U.S. 752 (1973), *reh. denied,* 411 U.S. 959 (1973); *Kusper v. Pontikes,* 414 U.S. 51 (1973).

The United States Supreme Court has not considered the constitutionality of a state statute which permits persons who designate themselves as independents to vote on a party's ballot in a primary.

In *Nader v. Schaffer,* 417 F.Supp. 837 (D. Conn. 1976), *aff'd without opinion,* 429 U.S. 989 (1976), the court concluded that the state's interest in protecting the integrity of the election justified the exclusion of "independents" from voting in a primary. Independents were defined as persons interested in and affected by the primary election but not willing to enroll as party members in accordance with the statutes.

[41] Note, *The Constitutionality of Non-Member Voting in Political Party Primary Elections,* 14 Willamette L.J. 259, 277, n. 103, 288; Hedlund, *Cross-Over Voting in a 1976 Open Presidential Primary,* 41 Pub.L.Q. 498, 501, 504 (19).

[42] In 1950 the Committee on Political Parties of the American Political Science Association expressed a preference for the closed over the open primary on the ground that the closed arrangement

(footnote continues)

recognized that in the real world in which elections are conducted the closed primary works in substantially the same way as the open primary:

> "[T]he essence of the legal definitions of party membership in the United States will surely continue to be *self-designation.* The fact remains that today even in Illinois, New York, or any other closed-primary state you are a Democrat if you say you are; no one can effectively say you are not; and you can become a Republican any time the spirit moves you simply by saying that you have become one. You accept no obligations by such a declaration; you receive only a privilege—the privilege of taking an equal part in the making of the party's most important decision, the nomination of its candidates for public office. The only remaining restriction is that in some states, such as California, you may have to let the registrar of voters know that you have changed parties, and you may have to do so several weeks or even months before your new party's next primary. But in many closed-primary states you do not even have to do that, and in Wisconsin and the other open-primary states you are not *allowed* to make an official declaration of your party membership. One can only conclude that the so-called 'closed' primaries are just a hair more closed than the so-called 'open' primaries." Ranney, *Curing the Mischiefs of Faction* 166-167 (1975).

Both the closed and open primary depend on the honesty and integrity of the voters and the voters' understanding of the nature of the party system and the function of the primary.[43]

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"tends to support the concept of the party as an association of like-minded people." Key, *Politics, Parties and Pressure Groups* 431 (4th ed. 1958).

For a discussion of the question whether primaries weaken the parties, *see* Austin Ranney, Richard G. Stearns & David A. Keene, N.Y. Times, Sun. Dec. 2, 1979, Section E 4,5; Ranney, *Curing the Mischiefs of Faction* 121-131; Scott & Hrebenar, *Parties in Crisis* 127-131 (1979); Sorauf, *Political Parties in the American System* 101 (1964); Schattschneider, *Party Government* 53-61 (1942).

[43] Ranney & Kendall, *Democracy and the American Party System* 207-208.

The significant difference between the open and closed primary is that voters "resent being prohibited from voting if they refuse to make a party declaration and having their affiliation a matter of public record for fear of losing their jobs or risking other penalties."[44] The significant difference between the Wisconsin open primary and a primary conducted under Rule 2A is not that the open primary permits significant numbers of "Republicans, independents and others" to vote on the Democratic ballot but that the open primary permits more people to vote on the ballot of their party by allowing a private declaration of party preference. Voters who prefer the Democratic Party in that primary, but who do not understand the significance of publicly declaring their Democratic Party preference or who think they are barred because they are not dues-paying party members or who are unwilling to publicly declare and record a party preference because of fear of undue pressure or harassment from employers, business associates, social acquaintances or party members, may be prevented from voting under Rule 2A but are able to vote under the open primary law.

We therefore conclude that the open primary law does not impose a substantial burden on the associational rights of the party. Indeed any burden appears speculative, remote and minimal.

IV.

Although we conclude that any infringement on the right to associate is minimal, we turn to a discussion of the state interest in maintaining an open primary.

A state law can substantially affect the associational freedoms of a political party. Such a law may, however, withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial government interest, *Dunn v. Blumstein,* 405 U.S.

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[44] Goodman, *The Two-Party System in the United States* 131.

330, 342, 343 (1972),[45] and that the state "employs means closely drawn to avoid unnecessary abridgment of associational freedoms," *Buckley v. Valeo,* 424 U.S. 1, 25 (1976). The United States Supreme Court has said that this rule does not invalidate "every substantial restriction on the right to vote or to associate. Nor could this be the case under our Constitution where the States are given the initial task of determining the qualifications of voters." *Storer v. Brown,* 415 U.S. 724, 729 (1973).

A.

The state's interest in maintaining an open primary and in not restricting voting in the presidential preference primary to those who publicly declare and record their party preference is to preserve the overall integrity of the electoral process by providing secrecy of the ballot, thereby encouraging increased voter participation and ensuring that the primary itself and the political party's participating in the primary are conducted in a fair and orderly manner.

In guaranteeing a private primary ballot, the open primary law serves an interest fundamental to a democracy—the critical interest of privacy of political preferences and convictions. This interest is "fundamental in a free society," and the advent of the secret ballot is "one of the great political reforms." *Buckley v. Valeo,* 424 U.S. 1, 237 (1976) (Burger, C.J., concurring).

In guaranteeing a private primary ballot, the open primary serves the state interest by encouraging voters to participate in selecting the candidates of their party which, in turn, fosters democratic government.[46] Historically the primary was initiated

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[45] Various tests have been used to describe the state interest which will justify interference with the freedom of political association: "legitimate" *Rosario v. Rockefeller,* 410 U.S. 752, 761-762 (1973); "important" *Jenness v. Fortson,* 403 U.S. 431, 442 (1971); "sufficiently important" *Buckley v. Valeo,* 424 U.S. 1, 25, (1976); "paramount and of vital importance" *Elrod v. Burns,* 427 U.S. 347, 362 (1976); and "compelling" *Cousins v. Wigoda,* 419 U.S. 477, 489 (1975).

[46] "Preservation of the democratic process is certainly an interest protection of which may in some instances justify limitations on First Amendment freedoms." *Elrod v. Burns,* 427 U.S. 347, 368 (1976).

in Wisconsin in an effort to enlarge citizen participation in the political process and to remove from the political bosses the process of selecting candidates. This state adopted the open primary in 1903 and has retained it over these many years in the belief that "facilitating and enlarging public discussion and participation in the electoral process are goals vital to a self-governing people." *Buckley v. Valeo,* 424 U.S. 1, 92-93 (1976). The legislature of this state believes democracy is best served by stimulating political activity.

Requiring a public, recorded declaration of party preference is an unnecessary barrier to voting. Voters who prefer the Democratic Party may be inhibited from voting because they do not understand the significance of the declaration or they think that they are barred because they are not dues-paying Democrats. Most importantly, voters who prefer the Democratic Party may be unwilling to declare and have publicly recorded a party preference because of fear of undue pressure or harassment.[47]

Requiring a public recorded declaration of party preference interferes with the state's entire election system which is based on the secrecy of the ballot and non-disclosure of party preference. The September primary for partisan state officers is similar to the presidential preference vote in that the voter need not make a public declaration of party preference; the voter must vote a straight-party ballot. Secs. 5.62, 10.02(3) 2m, Stats. In the spring election, which coincides with the presidential preference primary once every four years, Wisconsin voters elect hundreds of non-partisan executive, legislative and judicial officers on the state and local level. Secs. 5.60(3) (a), 8.05(3) (a) (d), (4) (a), Stats. Wisconsin has a long and

[47] In 1902 the most persuasive argument against adopting a closed primary system was that it violated the secrecy of the ballot by forcing the voters to declare publicly their party preference. Protecting the secrecy of the ballot is still a significant argument for retaining the open primary. Wisconsin Legislative Reference Bureau, *The Wisconsin Presidential Primary: Open or Closed?,* 7, 13; Ranney & Kendall, *Democracy and the America Party System,* 281; Note, *The Constitutionality of Non-Member Voting in Political Party Primary Elections,* 14 Willamette L.J. at 279.

strong tradition of non-partisan elections. Thus in Wisconsin, non-disclosure of the voter's party preference has been an integral facet of the process of the entire electoral process; non-disclosure of party preference extends to choosing presidential party candidates, partisan state and local candidates and an extensive array of nonpartisan officers.

Each state legislature should be free, within constitutional limits, to determine the qualifications of voters for the primary and to choose the primary election system that best promotes its electoral and governmental goals and best meets its needs. The open primary system has existed in Wisconsin for almost the entire 20th century. It is deeply engrained in the political institutions of the state and the political culture of the state. Epstein, *Politics in Wisconsin* (1958). The open primary law has functioned well in the state of Wisconsin for the citizens and for the political parties.

The Wisconsin open primary law is drawn with the "precision" required to pass constitutional tests. The law is "tailored" to serve its legitimate objectives with the least burden on constitutionally protected rights. *Dunn v. Blumstein,* 405 U.S. 330, 343 (1972). The Wisconsin primary law protects the commonality of interest of voters who prefer a particular party and also the rights of its citizens to vote and to associate. The legislature intends that people vote only in the primary of their party. Recognizing that a private declaration of party preference rather than a public-recorded one might tempt some to cross over, the legislature has taken measures to reduce the temptation and to protect the party's associational interests. We described these statutory techniques previously. In addition the legislature has limited the impact of the presidential preference primary vote to that of apportioning the delegates among the candidates. The presidential primary vote is not used to select delegates.

We conclude that any burden imposed on associational rights by the open primary law is minimal and is justified by Wisconsin's compelling and substantial governmental interests.

B.

Although the National Party wishes to characterize the presidential primary as a party nominating procedure in which the state has only a peripheral interest, such a characterization is outdated and simplistic. In *Marchioro v. Chaney,* U.S. , 99 S.Ct. 2243, 2248, n. 15 (1979), the United States Supreme Court upheld state regulation of political parties in their "critical role in the process of selecting and electing candidates for state and national office." When we are dealing with the two major political parties in the country, the primary is more than an election within a private club; it is a vital step in the process of electing the President. Indeed in some elections, the primary may be the critical stage in the election of the President.

The right to vote at the primary is no less important than the right to vote at the general election because the "ultimate choice of the mass of voters is predetermined, when the nominations have been made," *Newberry v. United States,* 256 U.S. 232, 286 (1921) (Pitney, J. dissenting).

The right of citizens to vote in primaries was aptly described by the Court of Appeals in *Lynch v. Torquato,* 343 F. 2d 370, 372 (3d Cir. 1965) as follows:

> "[T]he citizen's constitutional right to equality as an elector . . . applies to the choice of those who shall be his elected representatives in the conduct of government, not in the internal management of a political party. It is true that this right extends to state regulated and party conducted primaries. However, this is because the function of primaries is to select nominees for governmental office even though, not because, they are party enterprises. The people, when engaged in primary and general elections for the selection of their representatives in their government, may rationally be viewed as the 'state' in action, with the consequence that the organization and regulation of these enterprises must be such as accord each elector equal

protection of the laws. In contrast, [is] the normal role of party leaders in conducting internal affairs of their party, other than primary or general elections. . . ."

The courts have frequently recognized the significance of the primary in the totality of the elective procedure. In *Storer v. Brown,* 415 U.S. 724, 735 (1974), the United States Supreme Court, in upholding California's law forbidding a position on the ballot to independent candidates for Congress, stated:

". . . The direct party primary in California is not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial stage in a two-stage process by which the people choose their public officers. It functions to winnow out and finally reject all but the chosen candidates."

The critical nexus between the primary and the general election is further illustrated by the *White Primary Cases,* which sought to prevent racial discrimination in primary voting. *See, e.g., Terry v. Adams,* 345 U.S. 461 (1953), *reh. denied,* 345 U.S. 1003 (1953), *Smith v. Allwright,* 321 U.S. 649 (1944), *United States v. Classic,* 313 U.S. 299, 318 (1941), *Nixon v. Condon,* 286 U.S. 73 (1932), and *Nixon v. Herndon,* 273 U.S. 536 (1927).

In *State ex rel. La Follette v. Kohler,* 200 Wis. 518, 559-560, 228 N.W. 895 (1930), this court said:

"[T]he primary is a part of the election. When parties are recognized by the laws of a state and given a status in the law, party activities are thereby drawn within the field of regulation. As a matter of fact, the convention and caucus system and the primary election system are mere extensions of that which was originally included under the title *Elections* [in the Statute books]. Elections are the means by which choices are made by the electors. When the process of choosing begins the election has been begun. Originally so far as the law was concerned it was supposed to begin and end on election day. Then the law extended it by taking notice of caucuses and conventions.

> Later it substituted the primary for the caucus and convention. While the process has been extended it still is one thing—the making of a choice. This unity is indicated by the fact that the law requires that with a nomination paper there shall be filed by the proposed candidate a declaration that if nominated and elected he will qualify." (Footnotes omitted.)

Once the state provides a primary and makes the vote available to some persons, the right of all persons to vote becomes a basic one under the Constitution. *Rosario v. Rockefeller,* 410 U.S. 752, 764 (1973) (J. Powell dissenting, citing *Dunn v. Blumstien,* 405 U.S. 330 (1972); *Cramer v Union School District,* 395 U.S. 621 (1969); *Carrington v. Rash,* 380 U.S. 89 (1965)). The United States Supreme Court has protected the voters' right to participate in a primary election from state laws imposing substantial burdens on the franchise. *Rosario v. Rockefeller,* 410 U.S. 752 (1973), *reh. denied,* 411 U.S. 959 (1973); *Kusper v. Pontikes,* 414 U.S. 51 (1973).

The United States Supreme Court has repeatedly emphasized the significance of the right to vote as "a fundamental political right . . . preservative of all rights." *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886).

". . . No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Westberry v. Sanders,* 376 U.S. 1, 17 (1964), quoted in *Williams v. Rhodes* 393 U.S. 23, 31 (1968).

Public participation in the election of government officers is the essence of the American system of representative democracy. It is through elections, including primary elections, that public officials are chosen, that public policy is discussed and that the government is legitimized. The state has a legitimate role in regulating the presidential primary[48] and has a compelling interest in maintaining an open primary.

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[48] The United States Constitution gives the states a significant role in the election of the President of the United States. *Williams v. Rhodes,* 393 U.S. 23, 29 (1968); *Cousins v. Wigoda,* 419 U.S. 477, 495

(footnote continues)

C.

The National Party, citing *Cousins v. Wigoda*, 419 U.S. 477 (1975), argues that Wisconsin does not have a compelling interest to justify imposing a substantial burden on the Party's associational interest. The United States Supreme Court in *Cousins* held that Illinois' interest in protecting the integrity of its primary electoral process was not a compelling state interest in the context of selection of delegates to the National Party convention.[49]

We have concluded that the Wisconsin open primary does not substantially differ from a primary in which public declaration of party preference is required with regard to permitting non-Democrats to influence the selection of candidates and that therefore the open primary law does not constitute a substantial burden on associational rights. We also conclude that even if the burden were substantial, Wisconsin has a compelling state interest under the *Cousins* case.

The controversy in the *Cousins* case involved two delegations from Chicago competing to be seated at the 1972

(footnote continued)

(1975) (Rehnquist, J. concurring opinion). The ultimate power to elect the President of the United States is in the Electoral College composed of electors chosen by the state legislatures. Art. II, sec. 1, of the United States Constitution provides:

"Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors [to elect a president and vice-president]."

The United States Supreme Court has recognized that the "administration of the electoral process is a matter that the Constitution largely entrusts to the states." *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973).

[49] For a discussion of the *Cousins* case, *see* Note, *Cousins v. Wigoda, Primary Elections, Delegate Selection and the National Political Convention*, 70 N.W. L.Rev. 699 (1976); Case Note, *National Political Party Conventions: State's Interest Subordinate to Party's in Delegate Selection Process*, 29 U. Miami L.Rev. 806 (1975); Rotunda, *Constitutional and Statutory Restrictions on Political Parties in the Wake of Cousins v. Wigoda*, 53 Tex. L.Rev. 935 (1975); Note, *The Supreme Court and the Credentials Challenge Cases: Ask a Political Question, You Get a Political Answer*, 62 Calif. L.Rev. 1344 (1974).

Democratic national convention. In Illinois, the local parties select potential delegates prior to the primary, and the voters elect the delegates in the primary. It was alleged that in selecting delegates whose names would appear on the ballot the local party had violated National Party guidelines governing slate-making procedures; minority, women and youth participation; public notice of party affairs; and timing of delegate selection. In *Cousins*, the local party organization could have obeyed both the National Party guidelines and the Illinois statutes. The guidelines and statutes did not conflict; the statutes were silent on the disputed issue of local-party slate-making; the statutes and the guidelines thus complemented each other. *Brown v. O'Brien*, 469 F.2d 563, 572 (D.C. Cir. 1972).

Because of the violation of its guidelines, the National Party's Credentials Committee recommended that the convention refuse to seat the Wigoda delegation which was duly elected under the state statute and that the convention seat the Cousins delegation. The defects in the selection process of the Wigoda delegation went to the heart of the party's reform effort—opening the party to all interested in participating. After the Credentials Committee made its determination, the Illinois appellate court enjoined the Cousins delegates (whom the Credentials Committee supported) from acting as delegates to the Convention. The Cousins delegates contended that "the injunction constituted an unconstitutional 'significant interference' with protected rights of political association," *Cousins*, 419 U.S. at 488.

The Illinois court identified the state interest as protecting the "votes cast at the primary from the impairment that would result from stripping the [Wigoda delegates] of their elected-delegate status."

The United States Supreme Court identified the issue in *Cousins* as:

> ". . . whether the [Illinois] Appellate Court was correct in according primacy to state law over the National Political Party's rules in the determination of the qualifications and eligibility of delegates to the Party's National Convention," (419 U.S. at 483)

and decided that the Illinois Appellate Court was wrong in deciding that:

> "[t]he right to sit as a delegate representing Illinois at the national nominating convention is governed exclusively by the Illinois Election Code . . . .
>
> ". . .
>
> "[T]he law of the state is supreme and party rules to the contrary are of no effect. . . .
>
> "The interest of the state in protecting the effective right to participate in primaries is superior to whatever other interests the party itself might wish to protect. . . ." 14 Ill. App.3d 460, 472, 475, 302 N.E.2d 614 (1973); quoted in *Cousins*, 419 U.S. at 481-482.

The United States Supreme Court concluded in *Cousins* that the state's interest in protecting delegates elected under its electoral system was not in and of itself a sufficient justification to sustain a significant interference with the delegates' (and party's) associational interests.

The present case is distinguishable from *Cousins*. In *Cousins* the Party Rules and state statutes were complementary; no Illinois statutory provision conflicted with a party rule. Illinois' sole interest was to protect the result of its primary. In the case at bar Wisconsin statutes directly conflict with a Party Rule. Unlike *Cousins*, the State Party cannot comply with both the statute and the National Party Rules. Unlike Illinois, Wisconsin's interest is not merely to protect the results of the primary. Wisconsin has a compelling state interest in maintaining the special feature of its primary which permits private declaration of party preference.

The Attorney General and the State Party are not asserting, as was asserted in *Cousins*, that state law always prevails over a party rule without need to balance the interests of the state against the associational rights of the Party. They are not arguing that the National Party must seat any delegates selected by the State Party in accordance with Wisconsin law. They urge the court to hold that the National Party cannot

refuse to seat the Wisconsin delegation on the sole ground that the delegation was apportioned by utilizing the results of a primary in which no public declaration of party preference was required.

While the language of the majority opinion is couched in broad terms, we do not believe that *Cousins* stands for the proposition that every state law affecting delegates to a national convention and conflicting with a National Party Rule is automatically invalid and unenforceable. In cases subsequent to *Cousins*, the United States Supreme Court has not cited *Cousins* for this broad proposition. The Court has recognized the state's interest in regulating the role played by political parties in the process of selecting candidates for national office.

In *Marchioro v. Chaney*, U.S. , 99 S.Ct. 2243, 2246, (1979), the United States Supreme Court upheld a state law which directed political parties to create central committees and granted these statutorily created committees certain functions. The Court said:

> "The requirement that political parties form central or county committees composed of specified representatives from each district is common in the laws of the States. These laws are part of broader election regulations that recognize the critical role played by political parties in the process of selecting and electing candidates for state and national office. The State's interest in ensuring that this process is conducted in a fair and orderly fashion is unquestionably legitimate; 'as a practical matter there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.' *Storer v. Brown*, 415 U.S. 724, 730. That interest is served by a state statute requiring that a representative central committee be established, and entrusting that committee with authority to perform limited functions, such as filling vacancies on the Party ticket, providing for the nomination of presidential electors and delegates to national conventions and calling statewide conventions. Such functions are directly related to the orderly participation of the political party in the electoral process."

The Court commented on the scope of *Cousins* in *Marchioro* as follows:

> "*Cousins v. Wigoda,* 419 U.S. 477, upon which appellants place their primary reliance, does not support their claim here. In *Cousins,* unlike this case, there was a substantial burden on associational freedoms. This fact alone distinguishes the two cases, and renders *Cousins* inapposite." U.S. , 99 S.Ct. at 2248, n. 15.

Similarly in *Buckley v. Valeo,* 424 U.S. 1, 24, 25 (1976), the United States Supreme Court, in upholding certain aspects of the federal election law, cited *Cousins* for the proposition that states may interfere with the right of political association if the state's interest is sufficiently important:

> "[T]he primary First Amendment problem raised by the Act's contribution limitations is their restriction of one aspect of the contributor's freedom of political association. The Court's decisions involving associational freedoms establish that the right of association is a 'basic constitutional freedom,' *Kusper v. Pontikes,* 414 U.S., at 57, that is 'closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.' *Shelton v. Tucker,* 364 U.S. 479 (1960). See, *e.g., Bates v. Little Rock,* 361 U.S. 516 (1960); *NAACP v. Alabama, supra,* at 460-61; *NAACP v. Button,* 371 U.S., at 452 (Harlan, J., dissenting). In view of the fundamental nature of the right to associate, governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.' *NAACP v. Alabama, supra,* at 460-461. Yet, it is clear that '[n]either the right to associate nor the right to participate in political activities is absolute.' *CSC v. Letter Carriers,* 413 U.S. 548 (1973). Even a " 'significant interference" with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms. *Cousins v. Wigoda, supra,* at 488; *NAACP v. Button, supra,* at 438; *Shelton v. Tucker, supra,* at 488." 424 U.S. at 24-25.

Judge Frankel in *Fallon v. State Board of Elections of the State of New York*, 408 F.Supp. 636, 638 (S.D. N.Y. 1976), reads *Cousins* similarly:

> ". . . Read most liberally . . . *Cousins*, *supra*, held no more than that the policy of a national political party in setting qualifications for delegates to its convention may, in some circumstances, prevail over contrary state law.[3]"
>
> ". . .
>
> "[3]A fairer reading of *Cousins* probably does not go even this far. There, a state court enjoined the plaintiff-delegates who were not elected in the state primary from being seated at the 1972 National Democratic Convention after the Credentials Committee had refused to seat those delegates who were elected in the primary on the ground that certain slate-making procedures required by the Party's charter were not complied with. The plaintiffs appealed to the Supreme Court and took their seats in violation of the injunction. While contempt proceedings were pending, the Supreme Court reversed the state injunction, holding that it violated plaintiffs' right of freedom of political association. As Justice Rehnquist pointed out in his concurring opinion, the operation of the state injunction 'was as direct and severe an infringement of the right of association as can be conceived.' 419 U.S. at 491-92. Whether the *Cousins* decision can thus be read to hold that any national party rule overrules a contrary state election requirement is at best questionable."

The Wisconsin open primary law regulates the qualifications of voters and the manner of casting ballots for a presidential candidate; it does not govern the selection or qualification of delegates to the national convention. The results of the presidential preference primary are used by the State Party for the limited purpose of apportioning delegate votes to the various Democratic candidates for President. The National Party does not object to the fact that the delegates' votes are bound for a limited period.

Historically the states have regulated the qualifications for voting in the primary and the manner in which the ballot was

cast. Allowing Wisconsin to maintain an open primary does not allow " 'each of the fifty states [to] establish the qualifications of its delegates to the various party conventions without regard to party policy, an obviously intolerable result.' . . . [which] could seriously undercut or indeed destroy the effectiveness of the National Party Convention as a concerted enterprise engaged in the vital process of choosing Presidential and Vice-Presidential candidates—a process which usually involves coalitions cutting across state lines." *Cousins v. Wigoda*, 419 U.S. at 490.

This case does not arise "in the context of the selection of delegations to the National Party Convention" or in the context of determining " 'intra-party disputes as to which delegates [should] be seated'." *Cousins v. Wigoda*, 419 U.S. at 491. In this case, the state law does not impose a substantial burden on the National Party's right of association, and Wisconsin has a compelling interest in maintaining the special feature of its electoral law. *Cousins* is inapposite.

By the Court.—It is adjudged and declared that the Wisconsin electoral statutes involved in this controversy are constitutional, in full force and effect and binding on the petitioner and respondents; that the presidential preference primary shall be conducted in accordance with the Wisconsin statutes; and that Wisconsin delegates to the Democratic Party national convention shall be apportioned as required by statute in accordance with the results of the presidential preference vote and are not disqualified as delegates solely by reason of the apportionment being determined as required by the Wisconsin statutes.

APPENDIX TO OPINION OF THE COURT

5.02 **Definitions.** In Title II, unless the context requires otherwise:

(1) "Board" means the elections board.

. . .

(13) "Political party" or "party" means a state committee registered under s. 11.05 organized exclusively for political purposes, recognized by the national organization of the party, if any, under whose name candidates appear on a ballot at any election, and all county, congressional, legislative, local and other affiliated committees authorized to operate under the same name, except that the term does not include committees organized under s. 8.17 and assigned responsibilities under s. 7.30, with respect to such activities only.

. . .

(21) "Spring election" means the election held on the first Tuesday in April to elect judicial, educational and municipal officers, non-partisan county officers and to express preferences for the person to be the presidential candidate for each party.

5.37 **Voting machine requirements.** (1) Voting machines shall give every elector a reasonable opportunity to vote for any person for any office and on any proposition he is entitled to vote on, assure privacy to the elector so no one will know how he is voting or has voted, preclude the electors from voting for persons or propositions upon which they are not entitled to vote and from voting more than once for the same office or on the same proposition. Voting machines shall be constructed to lock so they cannot be manipulated, tampered with, or show the number of votes registered for any candidate or proposition while voting is in progress. The machines shall provide a method for electors to vote a straight party ticket, shall permit voting a split ticket and shall record each vote cast.

(2) When 2 or more wards or aldermanic districts are joined to use a voting machine, under s. 5.15(6)(b), the

machine shall be constructed to allow the electors to vote for all nominated candidates and issues for their aldermanic district or ward, but for no other.

(3) For presidential electors one device may be provided to vote for all of one party's electoral candidates at the same time. The device shall be opposite or adjacent to the ballot containing the names of the party's candidates for president and vice president.

(4) Voting machines may be used at primary elections when they comply with subs. (1) and (2) and the following provisions: All candidate's names entitled to appear on the ballots at the primary shall appear on the machine; the elector cannot vote for candidates of more than one party, whenever the restriction applies, and an elector who votes for candidates of any party may not vote for independent candidates at the September primary; the elector may secretly select the party for which he or she wishes to vote, or the independent candidates in the case of the September primary; the elector may vote for as many candidates for each office as he or she is lawfully entitled to vote for, but no more.

(5) Polling places may have more than one voting machine.

5.40 **Voting machines shall be used.** (1) The common council of every city and the trustees of every village with a population of 10,000 or more shall require the use of voting machines. Any other municipal governing body may adopt and purchase voting machines for use in the various wards.

(2) Only voting machines complying with s. 5.37 shall be used in any election in this state.

(3) Notwithstanding sub. (1), the use of voting machines shall be optional with the municipality for any territory of low population annexed to a city or village across the boundary of a legislative district, but shall again be mandatory as soon as the best evidence suggests that the population residing in the territory so annexed exceeds the minimum population for a ward as specified under s. 5.15 (2).

5.60 **Spring election ballots.** At spring elections the following ballots, when necessary, shall be provided for each ward.

(1) JUDICIARY; STATE SUPERINTENDENT OF PUBLIC INSTRUCTION; COUNTY EXECUTIVE AND COUNTY SUPERVISORS. There shall be one separate ballot for the county executive under ss. 59.031 and 59.032, county supervisors, judicial officers and the state superintendent of public instruction. Arrangement of the county executive and county supervisors within a county shall be arranged by the county clerk, or by the executive secretary of the county election commission under this section.

(a) The names of candidates for the same office shall be placed in the same column. No party designation may appear on the official ballot. A space shall be provided on the ballot for electors to write in the name of a person for each office, regardless of whether there is a primary for that office.

(b) The board shall certify the candidates' names and designate the official ballot arrangement for candidates for justice, court of appeals judge, circuit judge and state superintendent. The arrangement of names of all candidates on the ballot whose nomination papers are filed with the board shall be determined by the board by the drawing of lots on the day following the deadline for filing nomination papers.

(c) The county clerk or board of election commissioners shall determine the official ballot order for judicial office candidates not determined by the board, using the same method of determining arrangement of names on the ballot as that used by the board under par. (b).

(d) When 2 or more judges of the same court are to be elected, the official ballot shall contain the names of all candidates, shall state the number of judges to be elected and the number of candidates for whom each elector may vote. Each candidacy shall show the branch being filled.

(3) CITY. There shall be a separate ballot giving the names of all candidates for city and school offices, except under

sub. (4), printed in substantially the same form as annexed ballot "B". City election ballots may vary in form to conform to the law under which an election is held.

(a) No party designation shall appear on the official ballot.

(b) The city clerk or executive secretary of the city election commission shall arrange the official city ballot under s. 5.62 (4).

(4) CITY SCHOOL. (a) There shall be a separate ballot for city school officers when so required. Officers elected under s. 120.44(2)(a) may be placed on the same ballot as other city officers.

(b) In cities of the 1st class, there shall be a separate ballot giving the names of the candidates for any combined aldermanic district seat and any at-large member seat to be filled on the board of school directors. The names for the at-large seat shall be placed in the same column.

(5) VILLAGE. There shall be a separate ballot giving the names of all candidates for village offices.

(a) The offices to be filled shall be arranged on the official ballot in the order they are named in the statutes creating them. Where there is more than one ward, candidates shall be arranged by using the same method as that used by the board under sub. (1) (b). Sufficient space shall be left under each office for write-in candidates.

(b) Only persons nominated under s. 8.05 shall be placed on the official ballots. If no nominations are made, the spaces for this office shall be left blank.

(6) TOWN. There shall be a separate ballot giving the names of all candidates for town offices, except the superintendent of highways, in substantially the same form as annexed Ballot 6A or 6B. Ballot 6A is for the election of one supervisor and 6B is for the election of the 2 supervisors jointly. On Ballot

6B all supervisor candidates shall be listed together and the voting instructions shall state "Vote for Two". Towns now electing their supervisors jointly shall continue to do so until the method outlined for Ballot 6A is adopted at the annual town meeting. The names of candidates whose nomination papers are filed at the town level shall be arranged by using the same method as that used by the board under sub. (1) (b).

(7) REFERENDUM BALLOTS. There shall be a separate ballot setting forth all propositions requiring a vote in the form and manner provided by s. 5.64.

(8) BALLOTS FOR PRESIDENTIAL VOTE. There shall be a separate ballot for each party qualified under s. 5.62, listing the names of all potential candidates of that party determined under s. 8.12 and affording, in addition, an opportunity to the voter to nominate another potential candidate by write-in vote or to vote against the choices offered on the ballot. The order of such presidential candidates shall be determined by lot by or under the supervision of the board. Each voter shall be given the ballots of all the parties participating in the presidential preference vote, but may vote on one ballot only.

(a) An official ballot shall be printed and provided for use in each voting district. The form of each ballot shall be substantially as follows:

1. Form 1, to be used when there are several candidates:

OFFICIAL BALLOT
PRESIDENTIAL PREFERENCE VOTE
.... Party

MARK THIS BALLOT IN ONE SPACE ONLY. You have one of 3 choices—you may either:

Express your preference for one of the persons whose names are printed on this ballot (in that case, make a cross or other similar mark in the space after that person's name); or

Vote against all of the names printed on this ballot, thus in fact expressing your preference for an uninstructed delegation from Wisconsin to the national convention of the .... party (in that case, make a cross or other similar mark in the space following "None of the names shown"); or

Write in the name of another person to become the presidential candidate of the .... party (in that case, write that person's name into the space following "Write-in candidate").

OLE CARLSON .....( )
AMOS DUNCAN.....( )
JAMES UNDERWOOD.....( )
None of the names shown.....( )
Write-in candidate .....( )

2. Form 2, to be used when there is only one candidate:

OFFICIAL BALLOT
PRESIDENTIAL PREFERENCE VOTE
.... Party

MARK THIS BALLOT IN ONE SPACE ONLY. You have one of 3 choices—you may either:

Express your preference for the person whose name is printed on this ballot (in that case, make a cross or other similar mark in the space marked "YES" following that person's name); or

Vote against the person whose name is printed on this ballot, thus in fact expressing your preference for an uninstructed delegation from Wisconsin to the national convention of the .... party (in that case, make a cross or other similar mark in the space marked "NO" following that person's name); or

Write in the name of another person to become the presidential candidate of the . . . . party (in that case, write that person's name into the space following "Write-in candidate").

JOHN DOE ..... YES.... ( )
NO..... ( )
Write-in candidate ..... ( )

3. Form 3, to be used when there are no candidates who have qualified to appear on the ballot:

OFFICIAL BALLOT
PRESIDENTIAL PREFERENCE VOTE
. . . . Party

MARK THIS BALLOT IN ONE SPACE ONLY. There are no candidates of the . . . . party who have qualified to have their names appear on the printed ballot. You have 2 choices—you may either:

Express your preference for an uninstructed delegation from Wisconsin to the national convention of the . . . . party (in that case, make a cross or other similar mark in the space following "Uninstructed delegation"); or

Write in the name of a person to become the presidential candidate of the . . . . party (in that case, write that person's name into the space following "Write-in candidate").

Uninstructed delegation ..... ( )
Write-in candidate ..... ( )

(c) The official ballots for the presidential preference vote shall be securely fastened together at the bottom. The party casting the greatest number of votes for governor at the preceding election shall have its ticket placed on top and the remaining party ballots shall follow in the same manner. A facsimile ballot notice shall be published as provided in s. 10.02.

(d) After preparing his ballot, the elector shall detach it from the remaining ballots and shall fold it so that its face will be concealed. The printed indorsements and signatures or initials on the back of the ballot will then be visible. The remaining ballots shall be folded in like manner by the elector. The elector shall, without leaving the polling place, deliver in person the ballot on which he has expressed his presidential preference, and the remaining ballots to one of the inspectors for deposit in the proper ballot boxes.

(e) Immediately after the canvass the inspectors shall, without examination, destroy the ballots deposited in the blank ballot box.

(9) REFERENDA BALLOT. The referenda ballot used at the spring election shall be the same as that used at the general election under s. 5.64 (2).

5.62 **September primary ballots.** At September primaries, where necessary, the following ballot shall be provided for each ward, in substantially the same form as annexed Ballot 1.

(1)(a) There shall be an Australian ballot made up of the several party tickets with each party entitled to participate in the primary having its own ballot, and the independent candidates for state office shall have a separate ballot for all such candidates as under s. 5.64 (1)(e). The several ballots shall be secured together at the bottom. The party ballot of the party receiving the most votes for governor at the last general election shall be on top with the other parties arranged in an order based on their vote for governor at the last general election. The ballot listing the independent candidates shall be placed at the bottom.

(b) Every political organization listed as independent and every recognized political party listed on the official ballot at the last general election that received at least one percent of the total votes cast for any statewide office, including presidential elector, which was contested at that election shall have a separate primary ballot and separate column on the general election ballot. The chairman and secretary of the organization

which was "independent" at the last election shall certify to the board their party name, which shall not duplicate the name of an existing party.

(2) Any political organization may be represented by a separate ballot if, not later than June 1 in the year of a September primary, it files with the board a petition so requesting, signed either by electors equal to one-sixth of the total vote cast for governor in each of at least 10 counties at the last election or one-sixth of the electors in any senate, assembly or congressional district. When their candidates fulfill the nomination paper requirements, they shall appear on a separate ballot within the district or state.

(3) The board shall designate the official primary ballot arrangement for state offices by using the same procedure as the supreme court justice candidates under s. 5.60 (1)(b); congressional and state senate candidates by using the same procedure as for circuit court judges under s. 5.60 (1)(b) by numbering the assembly districts and parts of assembly districts within each congressional or senate district; and assembly candidates, by similarly numbering and arranging by population the counties within an assembly district. Independent candidates for state office shall be listed for each office in an order drawn by lot by or under the supervision of the board. The candidates shall then be listed under s. 5.60 (1)(b).

(4) The county clerk or county board of election commissioners shall designate the official primary ballot arrangement for all candidates filing nomination papers in that office.

(a) Within a county the county clerk shall arrange the names of all candidates filing nomination papers with his office using the same method as that used by the board under s. 5.60 (1)(b).

(b) The county board of election commissioners in counties having a population of more than 500,000 shall prepare the official primary ballot. The commissioners shall arrange the names of all candidates for each office whose nomination papers are filed at the county level, using the same method as that used by the elections board under s. 5.60 (1)(b).

(5) At the September primary, an elector may vote for the candidates of only one party, or the elector may vote for any of the independent candidates for state office listed; but the elector may not vote for more than one candidate for a single office.

8.05 **Nomination in towns and villages.** Every candidate for an elective office in a town or village shall be nominated under this section.

(1) CAUCUS. (a) When nomination papers are not used, there shall be a caucus to nominate candidates. The governing body shall between December 1 and January 1 decide the date of the caucus. The date of the caucus may be established between the first Tuesday in January and the last Tuesday in January. When possible, preference should be given to having the caucus on the last Tuesday in January.

(b) Whenever a caucus is held, the municipal clerk shall give notice of the time and date for the caucus by posting in his office and by one publication in a newspaper under ch. 985, at least 5 days before the date of the caucus.

(c) The town chairman or village president together with the municipal clerk shall serve as caucus officials. If the chairman or president is a candidate, he shall call for the election of officials to conduct the caucus. The officials shall be elected by acclamation or ballot as the meeting directs. The electors attending the meeting shall select 2 tellers to canvass the vote for each office at the caucus.

(d) Names of candidates shall be placed in nomination either by motion made and seconded from the floor or by writing the candidate's name on a slip of paper distributed by the tellers to those electors attending the caucus. Only persons placed in nomination shall be voted on.

(e) Nominations shall be made for one office at a time. Candidates for the office of town supervisor when elected jointly and of village trustee shall be considered one office for purposes of nomination and election.

(f) Before balloting the caucus chairman shall announce the names of all candidates placed in nomination.

(g) The voting for each office shall be by ballot, but the caucus chairman may dispense with voting when only one or 2 persons are nominated for the same office.

(h) The 2 candidates receiving the highest number of votes cast for each office shall be nominated and certified by the caucus chairman and tellers to the municipal clerk. The certified names of the candidates shall be placed on the official ballots. If a town under s. 5.60 (6) elects its supervisors jointly, candidates equal to twice the number of positions to be filled, who receive the most votes, shall be nominated and certified.

(i) Village trustees, excluding the office of village president, shall be nominated together and at large. Candidates, equal to twice the number of positions to be filled, who receive the most votes, shall be nominated and certified.

(j) Any candidate nominated at a caucus who files a written declination of nomination within 5 days shall not be included on the official ballot.

(3) TOWN NONPARTISAN PRIMARY. (a) In lieu of sub. (1), the electors either by referendum or at the town meeting may provide for nomination of elective town office candidates at a nonpartisan primary conducted as provided in sub. (5). The nomination papers shall be signed by not less than 20 nor more than 100 electors of the town. The nomination papers shall be circulated not sooner than December 1 preceding the election and shall be filed with the town clerk not later than 5 p.m. the first Tuesday in January, or the next day if Tuesday is a holiday.

(b) Notice shall be given under ss. 10.01 (2) (a) and 10.06 (2) (a).

(c) When this subsection is used, no additional candidates may be nominated under sub. (1).

(d) The question of adoption of the nonpartisan primary under this subsection may be submitted to the electors at any regular election held in the town or at a special election called

for the purpose. When a petition signed by 20 electors of the town is filed with the town clerk so requesting, the question shall be submitted to a vote.

(e) Petitions requesting a vote on the question at a regular town election shall be filed no later than 5 p.m. the last Tuesday in February. When the petition is filed, the clerk shall check its sufficiency. Whether at a regular or special election, the clerk shall give separate notice by one publication in a newspaper at least 5 days before the election.

(f) The ballot used for the referendum question shall be arranged under s. 5.60 (7) and shall ask: "Shall all candidates in the town of .... for elective town offices be nominated at a nonpartisan primary?"

(g) If a majority of the votes cast are in the affirmative, a nonpartisan primary, under sub. (5), shall thereafter be held to obtain candidates for elective town offices.

(4) VILLAGE NONPARTISAN PRIMARY. (a) A majority of the governing body of any village may provide under s. 8.11 (1) (a) and (b) that candidates for elective village office shall be nominated by a nonpartisan primary, under sub. (5). Determination of the governing body to provide for such primary under s. 8.11 (1)(a) shall be made not later than December 1 preceding the election.

(b) Nomination papers shall be signed by not less than 20 nor more than 100 electors of the village. The papers shall be circulated not sooner than December 1 preceding the election and shall be filed with the village clerk not later than 5 p.m. the first Tuesday in January, or the next day if Tuesday is a holiday.

(c) Notice shall be given, under ss. 10.01 (2) (a) and 10.06 (3) (a).

(d) When this subsection is used, no additional candidates may be nominated under sub. (1).

(5) WHEN PRIMARY IS HELD. Towns and villages adopting the nonpartisan primary to nominate candidates, under subs.

(3) and (4), shall hold a primary only when the number of candidates for an elective office in the municipality exceeds twice the number to be elected to the office. Those offices for which a primary has been held shall have only the names of candidates nominated at the primary appear on the official spring election ballot. When the number of candidates for an office does not exceed twice the number to be elected, their names shall be printed on the official ballot for the regular election without a primary.

(6) MENOMINEE COUNTY. In counties containing only one town candidates shall be nominated for the office of supervisors at large and by wards, and all applicable provisions of this section shall apply to their selection. In selecting the candidates for ward supervisor by caucus, the candidates for each ward shall be selected separately, and only those electors shall participate in each as are residents of that ward. Any ward candidate seeking nomination by the circulation of nomination papers shall incorporate in his nomination papers a statement that the signers are qualified electors of that ward.

8.12 **Presidential preference vote.** (1) SELECTION OF NAMES FOR BALLOT. In each year in which electors for president and vice president are to be elected, the voters of this state shall at the spring election be given an opportunity to express their preference for the person to be the presidential candidate of their party.

(a) On the first Tuesday in February * *in each* year *in which electors for president and vice president are to be elected,* there shall be convened in the capitol a committee consisting of, for each political party recognized under s. 5.62, the state chairman of that state party organization, the national committeeman and the national committeewoman; the speaker and the minority leader of the assembly, and the president and minority leader of the senate. This committee shall organize by selecting an eleventh member who shall be the chairman and shall determine, and certify to the board no later than on the Friday following the first Tuesday in February, the names of all

* Chapter 34, Laws of 1979, effective July 29, 1979.

candidates of the political parties recognized under s. 5.62 for the office of president of the United States. The committee shall have sole discretion that such candidates' candidacy is generally advocated or recognized in the national news media throughout the United States.

(b) No later than 5 p.m. on the first Tuesday in March of said year, any person seeking the indorsement by the national convention of a political party recognized under s. 5.62 for the office of president of the United States, or any group organized in this state on behalf of and with the consent of such person, may submit to the board a petition to have said person's name printed on the presidential preference ballot. Such petition shall be signed by a number of qualified electors equal in each congressional district to not less than 1,000 signatures nor more than 1,500 signatures. All signers on each separate petition shall reside in the same county.

(c) The board shall forthwith contact each person whose name has been placed in nomination under par. (a) and notify him or her that his or her name will be printed on the Wisconsin presidential preference ballot unless he or she files, no later than 5 p.m. on the last day in February of such year, with the board, a disclaimer stating without qualification that he or she is not and does not intend to become a candidate for the office of president of the United States at the forthcoming presidential election. The disclaimer may be filed with the board by certified mail, telegram or in person.

(2) BALLOTS. (a) The form of the official ballots shall be prescribed by the board under s. 5.60 (8).

(b) Except as otherwise provided in subs. (1) and (3) and s. 5.60 (8), the presidential preference vote election shall be noticed, held and conducted, and the results canvassed and returned, in the manner provided for judicial elections.

(2m) DELEGATE INFORMATION. The state chairman of each recognized political party having a presidential preference ballot shall certify to the board, no later than 5 p.m. on the 2nd Tuesday in March of presidential election years, the number of delegates who will be entitled to serve at the party's convention

from this state. At least two-thirds of such number shall be designated by congressional district and the remainder, if any, shall be designated at-large delegates. The number of at-large delegates and the number of district delegates certified by the party shall be the total number of delegates and the total number of alternates certified for such party by the board under sub. (3) (d).

(3) DELEGATES TO NATIONAL CONVENTION. (a) In canvassing the presidential preference vote, the specific candidate for president receiving a plurality in any district or in the state at large is entitled to control all the delegates representing such area in accordance with par. (c) 5. If the choice for "none of the names shown" receives a plurality, then all the delegates from the affected area shall be uninstructed. As an alternative to this procedure, the state chairperson of any political party having a presidential preference ballot may inform the board in writing no later than 5 p.m. the 2nd Tuesday in March of each presidential election year that the delegates from such party are to be certified on the basis of proportional representation. In such case, each presidential candidate shall be apportioned delegates committed to support him or her as nearly as possible in accordance with the percentage of the vote in a district or in the state at large which such candidate receives. Uninstructed delegates shall also be allotted as nearly as possible to represent the percentage of votes cast for "none of the names shown" in any district or in the state at large, in proportion to the percentage of votes cast for such option, but no fractional delegate votes shall be allowed in any party.

(am) No later than the last Monday in April following the presidential preference vote, the board shall notify each state party organization chairperson under sub. (1) (a) of the results of the presidential preference vote cast within his or her party, and the number of delegates from each congressional district and from the state at large which are to be pledged to each presidential candidate and the number which are to be uninstructed.

(b) After receiving the results of the presidential preference vote cast under par. (am), each state party organization shall select as many delegates or alternates as are allotted or

permitted this state's party organization by the national committee of the political party as certified under sub. (2m) in accordance with the results of the vote cast for each candidate or for the uninstructed delegation. The method of selecting the delegates or alternates shall be determined by the state party organization, but not less than two-thirds of the convention votes shall be allotted to congressional districts and these delegates and alternates shall be selected by the party organizations of each respective district. In executing the pledge under par. (c) 5, district delegates and district delegate alternates shall be bound by the outcome of the presidential preference vote in their respective districts, and the delegates and alternates representing the state at large shall be bound by the outcome of the total presidential preference vote in the state at large in accordance with the system of selection under par. (a) which is used by their party. The selection of delegates and alternates shall occur no earlier than the Tuesday after the last Monday in April following a presidential preference vote. The names of the suggested delegates and alternates pledged to a particular candidate shall be transmitted to that candidate for his or her approval no later than June 5, and the candidate shall notify the chairperson of the state party organization of his or her disapproval of any delegate or alternate by June 10, and where the candidate has disapproved his or her suggested delegates and alternates, he or she shall file his or her own list of delegates and alternates, which shall become that candidate's official slate of delegates and alternates to the national presidential convention. No person selected as a delegate or alternate is qualified to attend the national convention of his or her political party unless he or she files with the state chairperson of his or her political party a written declaration of acceptance, signed by himself or herself, on a form prescribed by the board, and the state chairperson deposits this declaration of acceptance in the office of the board no later than 5 p.m. on June 20.

(c) The declaration of acceptance shall be in the form of an affidavit and shall contain the following information:

1. The name, residence and post-office address of the delegate or alternate delegate.

2. A statement that he is a qualified voter.

3. A statement that he will not withdraw his name before the holding of the national convention of his party.

4. A statement that he is affiliated with the political party which selected him as a delegate or alternate to its national political convention.

5. If the delegate or alternate is selected to represent votes cast for a specific candidate for the office of president of the United States in accordance with the method of selection used by the party under par. (a), or is selected to replace such a person, a pledge in the following form:

"As a delegate to the 19 . . convention of the the . . . . party I pledge myself to support the candidacy of . . . . as a candidate for the nomination for president by the . . . . party; that I will, unless prevented by the death of the candidate, vote for his (or her) candidacy on the first ballot; and vote for his (or her) candidacy on any additional ballot, unless released by said candidate, until said candidate fails to receive at least one-third of the votes authorized to be cast; and that, thereafter, I shall have the right to cast my convention vote according to my own judgment".

(d) The board shall forthwith certify to the credentials committee at the national convention of each party recognized under s. 5.62 a list of the names of the delegates and alternates qualified to represent the party organization of this state by virtue of having complied with pars. (b) and (c).

(e) Any vacancy in an office of delegate or alternate to a national political party convention caused by the death, or inability for any reason to serve, of a delegate or alternate delegate shall be filled by the state committee of the political party organization entitled to make the original selection under par. (b), but no person selected to fill a vacancy under this paragraph is qualified to serve in place of any person required to execute the affidavit under par. (c) 5 unless he or she executes the affidavit.

10.02 **Type B notice content.** (1) Before any election an appropriate type B notice shall be published in substantially the form prescribed by the board at the times prescribed in s. 10.06.

The type B notice shall include the following relevant sections and be within the guidelines established in this section.

(2) (a) The headline or caption, the introductory paragraph and the voting instructions shall be printed once at the beginning of the notice followed by a facsimile of each ballot to be used at the election. The headline or caption shall be conspicuously displayed, but the caption together with the necessary spacing above and below shall not exceed 1¼ inches in depth. The introductory paragraph and voting instructions shall be set solid in the type of the regular reading matter of the newspaper but no smaller than 5½-point nor larger than 10-point type.

(b) Following the introductory paragraph, but preceding the facsimile ballot notice, the county clerk shall publish a statement of information to electors in the form prescribed in sub. (3). When the county clerk is not required to publish the instructions, the municipal clerk may do so.

(c) The facsimile ballots shall follow the voting instructions. The size and style of type and the general display of the facsimile ballots shall be prescribed by the board and shall conform substantially to the sample ballots annexed to the statutes. The party columns shall not exceed 2⅙ inches in width and the ballot size may be reduced. Voting machine facsimile ballots shall show a reduced diagram of the front of the voting machine and instructions to electors on how to vote on the machine.

(3) The statement of information to electors shall contain the following relevant sections:

FACSIMILE BALLOT NOTICE
OF ___ ELECTION

Office of _____ [County] [Municipal] Clerk. To the Electors of _____ [County] [Municipality]:

Notice is hereby given of a _____ election to be held in the several wards in the [county] [municipality] of _____, on the __ day of ____, 19__, at which the officers named below

shall be chosen. The names of the candidates for each office to be voted for, whose nominations have been certified to or filed in this office, are given under the title of the office and under the appropriate party or other designation, each in its proper column, together with the questions submitted to a vote, in the sample ballot below.

INFORMATION TO ELECTORS

Voting instructions shall be given substantially as follows:

(a) Upon entering the polling place, an elector shall give his or her name and address before being permitted to vote. Where paper ballots are used, the initials of 2 ballot clerks must appear on the ballot. Upon being permitted to vote, the elector shall retire alone to a voting booth or machine and cast his or her ballot. An election official may inform the elector of the proper manner for casting a ballot, but the official shall not in any manner advise or indicate for whom to vote.

(b) 1. If an elector wishes to vote for all candidates nominated by any party, the elector shall make a cross or other mark in the circle or depress the lever or button under the party designation printed at the top of the ballot. Unless a name has been erased or crossed out, another name written in, a mark placed to the right of a candidate for the same office in another column or a sticker applied, a mark in the circle at the top of the column is a vote for all the party's candidates listed in the column. If an elector does not wish to vote for all the candidates nominated by one party, the elector shall make a cross or mark in the square at the right of or separately depress the levers or buttons next to each candidate's name for whom he or she intends to vote, or shall insert or write in the name of a candidate.

2. At the presidential preference primary or a special partisan primary, the elector shall select the party ballot of his or her choice and shall make a cross or other mark in the square at the right of or depress the lever or button next to the candidate's name for each office for whom the elector intends to

vote, or shall insert or write in the name of the elector's choice for a candidate.

2m. At the September primary, the elector shall select the party ballot of his or her choice or the ballot containing the names of the independent candidates for state office, and make a cross or other mark in the square at the right of or depress the lever or button next to the candidate's name for each office for whom the elector intends to vote or insert or write in the name of the elector's choice for a party candidate, if any. In order to qualify for participation in the Wisconsin election campaign fund, a candidate for state office at the September primary must receive at least 6% of all votes cast on all ballots for the office for which he or she is a candidate, in addition to other requirements.

3. When casting a presidential preference vote, the elector shall select the party ballot of his or her choice and make a cross or other mark in the space at the right of or depress the button or lever next to the candidate's name for whom he or she intends to vote or shall, in the alternative, make such a cross or mark in the space at the right of or depress the button or lever next to the word "no" when only one candidate is shown on the ballot or "none of the names shown" when several candidates are shown on the ballot, or shall write in the name of his or her choice for a candidate.

4. At a nonpartisan primary, the elector shall place a cross or other mark in the square at the right of or depress the button or lever next to the candidate's name for each office for whom he or she intends to vote, or insert or write in the name of his or her choice for a candidate.

(c) In presidential elections, the elector shall place a cross or other mark in the square at the right of or depress the button or lever next to the set of candidates for president and vice president for whom he or she intends to vote. The vote shall be counted for all the candidates for presidential electors of those candidates.

(d) On referenda questions, the elector shall make a cross or other mark in the square at the right of or depress the button or lever next to the answer which he or she intends to give.

(e) The vote should not be cast in any other manner. If the elector spoils a ballot, he or she shall return it to an election official who shall issue another in its place, but not more than 3 ballots shall be issued to any one elector. If the ballot has not been initialed by 2 ballot clerks or is defective in any other way, the elector shall return it to the election official, who shall issue a proper ballot in its place. Not more than 5 minutes' time shall be allowed inside a voting booth or machine. Unofficial ballots or a memorandum to assist the elector in marking his or her ballot may be taken into the booth and copied. The sample ballot shall not be shown to anyone so as to reveal how the ballot is marked.

(f) After an official paper ballot is marked, it shall be folded so the inside marks do not show but so the printed indorsements and ballot clerks' initials on the outside do show. After casting his or her ballot, the elector shall leave the machine or booth, and where paper ballots are used, give his or her name to the inspector in charge of the ballot box, hand the inspector his or her folded ballot to be placed in the ballot box, and shall leave the polling place promptly.

(g) An elector may be assisted by 2 election officials of different political parties in casting his or her vote if the elector declares to the presiding official that he or she is unable to read, has difficulty reading, writing or understanding English or that due to physical disability is unable to cast his or her ballot. Alternatively, an elector making such declaration may have another elector of the county assist in marking the ballot or operating a voting machine. The presiding official may administer an oath to a person making such declaration.

(h) The following is a facsimile of the official ballot: (insert facsimile of ballot)

...., (County Clerk)
(Municipal Clerk)

(4) No further publication of notice provided for by this section or by a type B notice shall be required by the county or municipal clerk.

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 79-1328-OA

STATE OF WISCONSIN : IN SUPREME COURT

Filed January 19, 1980

Clerk of Supreme Court Madison, Wisconsin

STATE EX REL. BRONSON C. LA FOLLETTE,
Petitioner,

v.

DEMOCRATIC PARTY OF THE UNITED STATES OF AMERICA,

DEMOCRATIC NATIONAL COMMITTEE,

and

DEMOCRATIC PARTY OF WISCONSIN,
Respondents.

COFFEY, J. (Concurring) I concur with the court's opinion that the spring primary law is constitutional and binding on the state and national parties and that Wisconsin's spring primary election is one of the most important progressive traditions of this state. The court rightly refuses to be a party to manipulation of the people's right to vote in an open and binding primary election. What is in conflict is the National Democratic Party's desire to limit the people's freedom of choice as opposed to the interests of the state in maintaining and increasing voter participation in the process by which our

national leaders are chosen. The instrument used by the National Democratic Party, the public declaration of party affiliation, is poorly designed to further its announced goal of freedom of association. The associational interest thus advanced is greatly outweighed by the state's interest in protecting the privacy of the voting booth, encouraging full participation in the electoral process and maintaining the integrity of the Wisconsin nonpartisan spring election of local town boards, municipal, county and school boards and members of the state judiciary. Party politics has no place in the selection of those responsible for the education of our children.

Further, nothing could be more destructive of the concept of an independent, elected judiciary than party politics. This court has made it very clear that judges are not to become involved in party politics. Rule 12 of the Code of Judicial Ethics provides as follows:

> "A judge shall not be a member of any political party or participate in its affairs, caucuses, promotions, platforms, endorsements, conventions, or activities. He shall not make or solicit financial or other contributions in support of its causes, or publicly endorse or speak on behalf of its candidates or platforms."

Is it the intent of the National Democratic Party to disenfranchise 190 trial judges, 12 appellate judges and 7 justices of the supreme court of their constitutional right to vote on April 1, 1980?

A closed primary, where the only participants are those who publicly announce their affiliation with a political party, would seriously undermine the nonpartisan judicial elections to be held at the same time. The pressures on a candidate to violate the foregoing rule would be enormous. It is intolerable for the National Democratic Party to seek to impose on the state of Wisconsin a primary election system which would infringe on our independent, elected judiciary and our nonpartisan elected town, county, municipal and school board officials.

Robert M. La Follette, Sr. promoted the open primary as a means of restoring lost confidence in government. In these days when suspicion is so strong as to almost approach a belief in the

dishonesty and lack of integrity of our government officials, it is most imperative that the electorate have and exercise its right to participate in the selection of candidates, as well as the right to choose between the candidates selected. The Wisconsin voter is equally competent to cast his or her ballot at the primary or the general election. Invading the voter's privacy by requiring party affiliation be a matter of public record places undue pressure on the voter not to participate. Many will not take the chance that their names will appear on mailing lists and their privacy be further invaded. They will leave the field to the party professionals, the political bosses.

The Wisconsin open primary is more than an anti-bossism tradition as old as this century. It is also conducted at the same time as the nonpartisan spring election. These elections are another important Wisconsin tradition.

It is no answer to say that the primary election can be open so long as it is not binding on the delegates. The legislature has declared an open and binding primary election to be the public policy of the state of Wisconsin.

In recognizing this, our court has prevented the application of the unfortunate policy of the National Democratic Party so as to impose a closed or non-binding primary on the citizens of Wisconsin. I agree.

STATE OF WISCONSIN

IN THE SUPREME COURT

No. 79-1328-OA

STATE OF WISCONSIN EX REL.
BRONSON C. LA FOLLETTE,

Petitioner,

v.

DEMOCRATIC PARTY OF THE UNITED STATES OF AMERICA,
DEMOCRATIC NATIONAL COMMITTEE, AND
DEMOCRATIC PARTY OF WISCONSIN,

Respondents

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is given that respondents Democratic Party of the United States of America and Democratic National Committee appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Wisconsin, entered in this action on January 19, 1980.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ RONALD D. EASTMAN

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Suite 700
1333 New Hampshire Ave., N.W.
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Counsel for Democratic
Party of the United States
of America and Democratic
National Committee

March 11, 1980

CERTIFICATE OF SERVICE

I hereby certify that I have this 11th day of March, 1980, caused copies of the accompanying Notice of Appeal to be served on the following persons by air mail, postage prepaid:

Hon. Bronson C. La Follette
Attorney General
State of Wisconsin
114 East, State Capitol
Madison, Wisconsin 53702

Counsel for the
State of Wisconsin

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Counsel for the
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/s/ RONALD D. EASTMAN

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Party of the United States
of America and Democratic
National Committee

APPENDIX B

CONSTITUTIONAL PROVISIONS AND RULES

First Amendment, United States Constitution:

Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment, United States Constitution:

No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

Rule 2 of the Delegate Selection Rules for the 1980 Democratic National Convention:

PARTICIPATION

A. Participation in the delegate selection process in primaries or caucuses shall be restricted to Democratic voters only who publicly declare their party preference and have that preference publicly recorded. Documentary evidence of a process which complies with this rule shall accompany all state Delegate Selection Plans upon their submission to the National Party. Such rules, when approved by the Compliance Review Commission and implemented shall constitute adequate provisions within the meaning of Section 9 of the 1972 Democratic National Convention mandate.

B. A Rule 20 exemption shall not be granted from Rule 2A requirements.

C. A State Party which is precluded by state statute from complying with this rule, shall adopt and implement an alternative party-run delegate selection system which complies with this rule.

D. State Parties shall take all feasible steps to encourage non-affiliated and new voters to register or enroll as Democrats and to provide simple, easy procedures through which they may do so.

E. No person shall be excluded from any stage of the delegate selection process for failure to pay a cost or fee.

Rule 12 of the 1980 Delegate Selection Rules:

FAIR REFLECTION OF PRESIDENTIAL PREFERENCES

A. The Call for the 1980 Democratic National Convention shall include provisions that assure that the delegates to the 1980 Democratic National Convention be chosen in a manner which fairly reflects the division of preferences by those who participate in the presidential nominating process in each state, territory and the District of Columbia.

B. At all stages of the delegate selection process, delegates shall be allocated in a fashion that fairly reflects the expressed presidential preference or uncommitted status of the primary voters or if there is no binding primary, the convention and caucus participants except that preferences securing less than the applicable percentage of votes cast for the delegates to the National Convention shall not be awarded any delegates . . . The CRC shall adopt regulations to prevent winner-take-all outcomes at the Congressional District or other smaller delegate selection unit. The CRC shall adopt regulations to govern the allocation of

delegates in instances where no candidate reaches the applicable percentage.

C. At the level at which the National Convention delegates are selected, delegate selection systems which permit a plurality of votes to elect all of the delegates from that level shall not be used. Under no circumstances shall the use of single member delegate districts be permitted. State Democratic Parties shall ensure that District lines are not gerry-mandered in order to discriminate against blacks or any other racial or ethnic minority. For purposes of these rules, plurality is defined as the most votes received by a candidate, whether or not that vote was the majority of the votes cast.

D. For the purpose of fairly reflecting the division of preferences, the non-binding advisory presidential preference portion of primaries shall not be considered a step in the delegate selection process.

Rule 20 of the 1980 Delegate Selection Rules:

STATE LEGISLATIVE CHANGES

A. Wherever any part of any section contained in these rules conflicts with existing state laws, the State Party shall take provable positive steps to achieve legislative changes to bring the state law into compliance with the provisions of these rules.

B. Provable positive steps shall be taken in a timely fashion and shall include the drafting of corrective legislation; public endorsement by the State Party of such legislation; efforts to educate the public on the need for such legislation; active support for the legislation by the State Party lobbying state legislators, other public officials, Party officials

and Party members; and encouraging consideration of the legislation by the appropriate legislative committees and bodies.

C. A State Party may be required to adopt and implement an alternative Party-run delegate selection system which does not conflict with these rules, regardless of any provable positive steps the state may have taken.

The relevant state statutes appear in Appendix A, as an Appendix to the Wisconsin Supreme Court's opinion, and are not reprinted here.

DEC 3 1980
MICHAEL RODAK, JR., CLER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1631

DEMOCRATIC PARTY OF THE UNITED STATES OF AMERICA and DEMOCRATIC NATIONAL COMMITTEE,
Appellants

v.

WISCONSIN *ex rel.* BRONSON C. LA FOLLETTE, and DEMOCRATIC PARTY OF WISCONSIN,
Appellees

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

SUPPLEMENTAL BRIEF

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June 3, 1980

IN THE

Supreme Court of the United States

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DEMOCRATIC PARTY OF THE
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ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

SUPPLEMENTAL BRIEF

The Democratic Party of the United States of America and the Democratic National Committee (the "National Party") file this Supplemental Brief to advise this Court of the decision of the United States District Court for the Western District of Michigan in *Ferency v. Austin,* No. G80193 CA5 (April 21, 1980), a copy of which is attached. At the time the National Party filed its Jurisdictional Statement the case was still awaiting decision by the District Court. Jurisdictional Statement at 8,

n. 9. The District Court has since decided the *Ferency* case in a manner that conflicts directly with the decision of the Wisconsin Supreme Court which is the subject of this appeal.[1]

In *Ferency* the plaintiff asked the District Court to declare the Michigan open primary law constitutional as it applied to the state Democratic party. Under the Michigan statute, as under the Wisconsin statute at issue in this appeal, delegates to the Democratic National Convention must be apportioned among candidates for the nomination in proportion to the percentage of the votes those candidates receive in the open primary. See Jurisdictional Statement at 6. As under the Wisconsin statute, the Michigan law permits crossover voting, and voters can only vote in one party's primary. *Ferency v. Austin*, slip op. at 2. The State party would then choose the delegates who would cast predetermined votes at the National Convention.

The District Court concluded that "[b]ased on *Cousins v. Wigoda, supra* . . . the Michigan presidential primary statute is unconstitutional as applied to the Democratic Party in this case because the Act attempts to exclusively preempt the Party's delegate selection process." *Id.* at 14. The Court noted that the Michigan statute conflicts with the National Party's rules governing delegate selection (specifically Rule 2A) because "there are no restrictions against 'cross-over' voting." *Id.* It noted that the party has no "interest of greater significance" than "having its leadership selected by its own members" and found a direct abridgement of essential associational rights. *Id.* at 15. In light of the infringement of the National Party's legitimate interests, the Court said, Michigan's " 'compelling interests' wane." *Id.*[2]

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[1] Although the District Court decided *Ferency* in April, counsel for the National Party did not become aware of the decision until after the filing of its Brief Opposing Motion to Dismiss or Affirm (filed May 29, 1980.)

[2] Counsel is advised that the plaintiff in *Ferency* has filed an appeal.

Because the Michigan and Wisconsin statutes are identical in all material respects, there is a direct conflict between the *Ferency* decision and the case on appeal. There is a serious need for the Court to reaffirm or at least clarify its view of the constitutional rights of national political parties addressed in *Cousins*.

CONCLUSION

For these reasons the Court should note probable jurisdiction.

Respectfully submitted,

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UNITED STATES OF AMERICA
IN THE DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ZOLTON FERENCY,

Plaintiff, Case No. G80-193 CA5

-vs-

RICHARD H. AUSTIN, Secretary of State; BERNARD APOL, Director, Elections Division, Department of State and BOARD OF STATE CANVASSERS, *ORDER*

Defendants.

The plaintiff, Zolton Ferency, having filed a motion for declaratory judgment in the above-entitled action, and the court having read the pleadings and the briefs of the parties concerning these matters, and having had the benefit of oral argument, and being fully informed, and pursuant to the Opinion filed this date;

IT IS HEREBY ORDERED that plaintiff's motion for a declaratory judgment is denied.

IT IS FURTHER ORDERED that the above-entitled action is dismissed.

Douglas W. Hillman
District Judge

Dated: April 21, 1980

UNITED STATES OF AMERICA
IN THE DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ZOLTON FERENCY,

Plaintiff, Case No. G80-193 CA5

-vs-

RICHARD H. AUSTIN, Secretary of State; BERNARD APOL, Director, Elections Division, Department of State and BOARD OF STATE CANVASSERS, *OPINION*

Defendants.

INTRODUCTION

Plaintiff, Zolton Ferency, has filed suit against the Michigan Secretary of State, the State Director of Elections[1], and the Board of State Canvassers, seeking a declaratory judgment concerning the administration of the Michigan presidential primary election to be held on May 20, 1980. At issue is the constitutionality of the state's election law as it applies to the Democratic Party, and the authority of the state elections officials to supervise party-run caucuses.

Suit was initially filed on March 20, 1980, in Ingham County Circuit Court under the state's Administrative Procedures Act of 1969 (M.C.L.A. §24.201, *et seq.;* M.S.A. §3.560(101), *et seq.*). That same day, Judge Ray C. Hotchkiss entered an order to show cause why plaintiff's request for a declaratory ruling should not be granted, and a hearing was scheduled for March 26, 1980. On March 25, 1980, the defendants removed the case to this court, and because plaintiff

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[1] Bernard Apol, Director of the Elections Division of the Department of State, has recently retired.

alleged violations of privileges and immunities guaranteed to him by the United States Constitution, jurisdiction was maintained under 28 U.S.C. §1343(3).[2]

Plaintiff thereafter moved for a declaratory judgment pursuant to the federal Declaratory Judgment Act, 28 U.S.C. §2201. Due to the importance of the questions presented, plaintiff's motion was advanced on the court's calendar and a hearing scheduled for April 11, 1980. By agreement of the parties, the Michigan Democratic Party was permitted to participate in an *amicus* capacity. At oral argument, all participants agreed that no genuine issue of material fact existed which would preclude a prompt decision by this court. For the reasons that follow, I deny plaintiff's motion for declaratory relief, and I accordingly dismiss the case.

FACTS

In the early part of the Twentieth Century, the movement toward democratization of the presidential nominating process

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[2] 28 U.S.C. §1343 reads:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

led several states to adopt presidential preference primaries. In 1904, Florida became the first such state to permit this type of election. Others soon followed, so that by 1916, primaries were being conducted in 26 states.

By 1968, this number dwindled to 16, due in large part to the prohibitive costs. Because of the sudden advent of intense media coverage, however, 35 states now employ primary elections as a means of choosing their party delegations. (*See*, Durbin and Seitzinger, *Nomination and Election of the President and Vice President of the United States*, pp. 134-135; U.S. Government Printing Office: 1980.)

Michigan first enacted a presidential primary election law in 1972. Prior to that time, representative delegations were picked in state conventions, and before that, in party caucuses. The presidential primary in Michigan is an open primary in that any individual may vote for the candidates of any party on the ballot. A Republican, a Democratic, a minor party member, or an independent may cast his or her ballot in either the Republican or the Democratic primary without making a prior declaration as to party affiliation. This procedure is known as "cross-over" voting, and is permitted in several other states.

Following the 1976 presidential election, the National Democratic Party reevaluated its support of crossover voting. This led to a rule change embodied in the Delegate Selection Rules for the 1980 Democratic National Convention (hereinafter "Rules") issued by the Democratic National Committee in 1978. Rule 2A of the Delegate Selection Rules restricts participation in the delegate selection process in primaries or caucuses "to Democratic voters only who publicly declare their party preference and have that preference publicly recorded". Under Rule 2C, state parties which are precluded by state statute from complying with Rule 2A, must adopt and implement an alternative delegate selection system which complies with Party rules. No exemptions are granted (Rule 2B).

On August 18, 1979, the Michigan Democratic Party adopted its 1980 delegate selection plan containing alternative methods for choosing delegates to the national convention. Under the first option, a Michigan delegation would be selected via the Michigan primary election law provided that the state's open-primary features were eliminated prior to October 1, 1980. Failure to amend state law would result in the Party's employment of a second option providing for the establishment of party-run caucuses. Under this plan, participation would be limited solely to Party members who had publicly registered before February 26, 1980. Because the state legislature failed to timely act, the Democratic State Central Committee officially adopted the caucus-alternative on October 13, 1979.

Thereafter, members of the State Senate wrote to the Michigan Attorney General and asked that steps be taken to force the Democratic Party's participation in the state presidential primary. The Attorney General replied on December 6, 1979, informing the legislators that under his reading of recent Supreme Court rulings, state officials were without authority to compel participation in the primary. A second letter to the same effect was sent to the Senate Majority Leader in January, 1980.

On December 10, 1979, Olivia Maynard, the chairperson of the Michigan Democratic Party, informed the Secretary of State that the party would not comply with the rules and requirements of the state's primary election law. Instead, the Democrats informed the Secretary of State that a caucus method would be used to select delegates to the national convention, and moreover, that members of the Democratic Party likely to be listed as candidates on the state's primary election ballot would be requested to withdraw from competition. In fact, President Carter and Senator Kennedy later withdrew. At this time, only Lyndon H. LaRouche, Jr., and Edmond G. Brown, Jr., are listed as participating candidates.[3]

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[3] As of this writing, Governor Brown has publicly stated that he no longer views his candidacy as viable and has consequently terminated his campaign.

In January of this year, plaintiff delivered a letter to the Elections Division of the Department of State addressed to the Board of State Canvassers requesting a declaratory ruling concerning, among other things, the propriety of the Secretary of State's refusal to enforce Michigan's presidential primary election law. Specifically, the plaintiff demanded an explanation for the defendants' refusal to comply with M.C.L.A. §168.620, which reads:

> Sec. 620. All rules, procedures, allocation of national delegates, additional qualifications for delegates and delegations of authority, by any state central committee under the provision of this act relating to presidential primary elections, shall be filed with the secretary of state no later than December 31 of the year preceding the presidential election except that in 1972, such rules, procedures, allocation of national delegates, additional qualifications for delegates or delegations of authority shall be filed with the secretary of state no later than the second Friday of March. If the state central committee of any political party, for which a presidential primary is to be held under section 613,[1] fails to file any rules, procedures, allocation of national delegates, additional qualifications for delegates and delegations of authority necessary for the appropriate implementation of this act relating to presidential primary elections, the secretary of state forthwith shall issue them to the extent necessary. The secretary of state shall insure that all such rules, procedures, allocation of national convention delegates, additional qualifications for delegates, delegations of authority and the general provisions of this act relating to the presidential primary election shall be widely publicized in the mass communications media and made easily available to the public.

Plaintiff was thereafter notified of a hearing on his requested ruling to be held by the Board of State Canvassers on February 7, 1980. Plaintiff attended, submitted a memorandum, and responded to questions propounded by members

of the Board. The next day, plaintiff wrote defendants Austin and Apol in order to clarify the fact that he was specifically requesting a ruling on these matters by the Secretary of State's office and by the Elections Division of the Department of State, as well as by the Board of Canvassers. Plaintiff was not informed until February 21, 1980, that the matter was referred to the state's Attorney General.

Although plaintiff had requested an "expeditious" ruling by the defendants, he heard nothing more of the matter. Consequently, as already stated, plaintiff filed suit in state court, which was removed by the defendants to this court on March 25, 1980.

In his complaint and motion for a declaratory judgment, plaintiff requests this court to adjudge and declare that:

(a) under state law (M.C.L.A. § 168.613[4]), the Democratic Party, because it received greater than 5% of the total vote cast in the last nationwide presidential election, is obligated to participate in the State's presidential primary election to be held May 20, 1980, and to allocate its delegates to the August Democratic National Convention pursuant to that primary election;

(b) under state law (M.C.L.A. §168.620), the Democratic Party is obligated to file with the Secretary of State the rules and procedures which it will use in allocating its delegates to the national convention, and that if the Democratic Party fails to issue these rules by December 31, 1979, as required by law, the Secretary of State is then required to "forthwith" issue his own rules to the extent that they are necessary;

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[4] M.C.L.A. §168.613 reads in part:

"Sec. 613. On the third Tuesday in May, in each presidential election year, a statewide presidential primary election shall be conducted in accordance with this act for each political party that received greater than 5% of the total vote cast nationwide in the last presidential election. In each presidential election year delegates to county conventions shall be elected at the presidential primary election."

(c) alternatively, if the Democratic Party is in fact not obligated to participate in the state presidential primary election, then under state law (M.C.L.A. § 168.611),[5] the Democrats must participate in and elect their delegates to the national convention by way of a state convention;

(d) alternatively, if in fact the Democratic Party may proceed to elect its delegates by way of party-run caucuses as intended, then it is a violation of state law and of the United

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[5] M.C.L.A. §168.611 reads:

Sec 611. In the year 1956, and each fourth year thereafter, delegates of each political party who were elected to the last prior fall county convention shall reconvene in a county convention. Such county conventions shall, when so convened, elect delegates to a state convention. The number of delegates so elected shall be the same as the number elected to the last prior spring state convention. Said county conventions shall be held at least 90 days prior to the time set for the holding of the national convention of its political party. All county conventions shall be held on the same day and time. The time and place shall be fixed by the state central committee. A state convention shall be held in the year 1956, and each fourth year thereafter, composed of delegates so elected by the respective county conventions which shall be held at least 60 days prior to the holding of the national convention of its political party. On the date and prior to the state convention and at the place designated for the state convention, the delegates so elected by the respective county conventions shall convene in caucus in congressional districts and the delegates of each congressional district shall elect 2 district delegates to the national convention of its political party, and shall report to the state convention the names of the delegates so elected at each congressional caucus. The time for each of said caucuses shall be designated by the chairman of the state central committee. The state convention shall convene and shall elect the balance of the delegates to the national convention of its political party to which it is entitled under the call of the national convention as delegates-at-large. The convention shall likewise elect presidential electors in the manner now provided by law. Delegates chosen by the respective congressional districts and reported to the convention and delegates-at-large elected at the state convention shall be certified as the state delegation of such political party to its national convention by the chairman and secretary of the state convention. Such county and state conventions shall be conducted in accordance with the law now governing spring and fall county and state conventions.

States Constitution to restrict participation in the caucuses solely to members of the Democratic Party who have registered and paid party dues prior to February 28, 1980; and

(e) persons who have participated in the Party-run caucuses violate state law by participating in the May primary election.

Defendants respond in two ways. First, they contend that plaintiff lacks standing under the state's Administrative Procedures Act (hereinafter "APA") and that his standing in this court is premised solely upon the federal Declaratory Judgment Act. They maintain that under the federal Declaratory Judgment Act, they may raise equitable defenses. Consequently, defendants argue that plaintiff's action should be dismissed because a decision by this court would not be in the public's interest, would be futile, and because of laches.

Moreover defendants assert that state election authorities are precluded, under the United States Constitution, from compelling political party participation in state primary elections. They cite as support the recent Supreme Court decision, *Cousins* v. *Wigoda,* 419 U.S. 477 (1975). Defendants then maintain that because the party caucuses are not elections under state law, the Secretary of State has no authority to supervise or regulate those proceedings. For these reasons, defendants request this court to deny plaintiff's claims for relief.

DISCUSSION

I.

Defendants preliminarily question plaintiff Ferency's standing to maintain the present action. As already stated, although defendants admit that plaintiff has standing under 28 U.S.C. §1343(3) to seek a declaratory judgment in this court concerning his federally guaranteed privileges and immunities, they question plaintiff's original standing in state court under the state's APA. Defendants' intent is to limit plaintiff's federal

court jurisdiction to the Declaratory Judgment Act, 28 U.S.C. §2201, where equity defenses such as laches or futility may be raised. *See, Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967); *American Airlines, Inc.* v. *Louisville & Jefferson County Air Bd.,* 269 F.2d 811 (6th Cir. 1959).

In January, 1980, plaintiff sought a declaratory ruling from defendants concerning the propriety of their refusal to enforce, against the state Democratic Party, Section 620 of the state's primary election law. Defendants thereafter refused to issue a ruling, based on their conclusion that under Section 63 of the APA[6], issuance of declaratory rulings is a matter within an agency's discretion.

Plaintiff then sought relief in circuit court under Sections 63 and 64 of the Act.[7] Under Section 63, a court is authorized to review a declaratory ruling concerning an agency's administration of a state statute issued by that agency pursuant to a request made by an "interested person". The reviewing court is

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[6] M.C.L.A. §24.263 reads:

Sec. 63. On request of an interested person, an agency may issue a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency. An agency shall prescribe by rule the form for such a request and procedure for its submission, consideration and disposition. A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by any court. An agency may not retroactively change a declaratory ruling, but nothing in this subsection prevents an agency from prospectively changing a declaratory ruling. A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case.

[7] M.C.L.A. §24.264 reads:

Sec. 64. Unless an exclusive procedure or remedy is provided by a statute governing the agency, the validity or applicability of a rule may be determined in an action for declaratory judgment when the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The action shall be filed in the circuit court of the county where the plaintiff resides or has his principal place of

(*footnote continues*)

empowered to set aside or modify the declaratory ruling where the court determines that the agency's decision is arbitrary, unlawful, unsupported by the evidence, or otherwise unwarranted.[8] Under Section 64, an "interested person" is entitled to request a court to adjudge the legitimacy of an agency's previously-promulgated "rule", or the threatened application of a "rule", as that term is defined in Section 7 of the Act.

Defendants admit that the agencies involved failed to issue the declaratory rulings as requested. For this reason, they

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(*footnote continued*)

business in this state or in the circuit court for Ingham county. The agency shall be made a party to the action. An action for declaratory judgment may not be commenced under this section unless the plaintiff has first requested the agency for a declaratory ruling and the agency has denied the request or failed to act upon it expeditiously. This section shall not be construed to prohibit the determination of the validity or applicability of the rule in any other action or proceeding in which its invalidity or inapplicability is asserted.

[8] A declaratory ruling is subject to review under M.C.L.A. §24.306, which reads:

Sec. 106. (1) Except when a statute or the constitution provides for a different form of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:

(a) In violation of the constitution or a statute.

(b) In excess of the statutory authority or jurisdiction of the agency.

(c) Made upon unlawful procedure resulting in a material prejudice to a party.

(d) Not supported by competent, material and substantial evidence on the whole record.

(e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.

(f) Affected by other substantial and material error of law.

(2) The court, as appropriate, may affirm, reverse or modify the decision or order or remand the case for further proceedings.

argue, plaintiff lacks standing under either Section 63 or Section 64 of the APA because judicial review is available only for agency rules or declaratory rulings, and not for agency refusals to rule. In this regard, however, defendants are mistaken. The state Court of Appeals, in *Human Rights Party* v. *Michigan Corrections Commission,* 76 Mich.App. 204, 256 N.W. 2d 439 (1977), held that under Section 63 of the APA, a reviewing court properly maintains jurisdiction over refusals of agencies to issue declaratory rulings concerning their duties under state statutes. The unanimous panel said at p. 441:

> " In the present case, plaintiffs seek a *declaratory* ruling as to the applicability to an actual state of facts of a statute administered by defendants; specifically, overcrowded prison conditions vis-a-vis statutes concerning prison administration ...Defendants, however, refuse to issue any declaratory ruling and the question becomes whether there is judicial review of this refusal. We are of the opinion that there is. Although this is not specifically provided for in the statute, we find that the intent of the Legislature in establishing this declaratory ruling provision is to afford judicial review of an agency's refusal to make any ruling." (Footnote omitted).

Moreover, even if plaintiff did not have standing under Section 63 of the APA, I find that he could premise the court's jurisdiction upon Section 64 based upon the rule laid down in *Michigan Farm Bureau* v. *Bureau of Workmen's Compensation,* 75 Mich.App. 362, 254 N.W.2d 890 (1977). There, the director of the state's Workmen's Compensation Bureau distributed to self-insured employers statements concerning the director's interpretation of a then-recent Michigan Court of Appeals decision involving the state's Workmen's Compensation Act of 1969. *See, Jolliff* v. *American Advertising Distributors, Inc.,* 49 Mich.App. 1, 211 N.W. 260 (1973), *Lv. Den.,* 391 Mich. 780 (1974). In his statement, the director declared that in light of the court's holding, new minimum

compensation rates would apply. The employers then brought suit in circuit court pursuant to Section 64 of the APA challenging the Director's interpretation of the state court's decision. The circuit court held that the Bureau's newly-announced policies did not constitute "rules" under the APA, and thereupon dismissed the action for lack of jurisdiction.

A unanimous Court of Appeals panel reversed. The court held that the Bureau's interpretation of *Jolliff* constituted a "rule" for purposes of the APA because the announcements at issue amounted to new statements of policy which applied the Workmen's Compensation Act in an unprecedented fashion.

Similarly, in the present case, the state Attorney General twice announced that the state's primary election laws would not be enforced against the Democrats due to his interpretation of the Supreme Court decision in *Cousins* v. *Wigoda, supra.* This situation is identical to that in *Michigan Farm Bureau,* and I therefore find that case to be persuasive.

Defendants' removal of this case from Circuit Court cannot act to deny the plaintiff standing he would otherwise have had under the state's APA. *See,* 14 Wright and Miller, *Federal Practice and Procedure* §3722 (1976).

II.

The substance of plaintiff's complaint concerns the Democratic Party's refusal to participate in the Michigan presidential primary election, as set out in M.C.L.A. §168.613, *et seq.,* M.S.A. §6.1613, *et seq.* Plaintiff alleges that the Democratic Party is mandated under Section 613 to participate in the state's primary, and that under Section 620, the Secretary of State has the authority to enforce that participation. For this reason, plaintiff contends that the Secretary of State must compel the Democrats to take part in the upcoming primary election, and to elect national convention delegates pursuant to the Act.

Defendants support their refusal to compel Democratic Party participation by relying on the case, *Cousins* v. *Wigoda, supra.* There, defendants maintain, the Supreme Court held that states were precluded from enforcing their election laws where enforcement of those laws would interfere with a political party's paramount right to freedom of association. For this reason, defendants argue, the state in this case is constitutionally prohibited from compelling primary election participation by the Democratic Party because enforcement of the state's election laws would abridge the Party's right to set the requirements and eligibility of its delegates to the National Convention.

Ferency does not agree. Because cross-over voting is not illegal, he argues, the Michigan primary election is not in and of itself illegal or unconstitutional. Moreover, he contends that the Michigan Democratic Party is not precluded from attempting to seat at the National Convention any delegation it pleases. For this reason, the plaintiff maintains that there is no abridgement of the party's associational interests, as well as no excuse for the defendant Secretary of State's refusal to enforce the state's election laws.

A.

As the Supreme Court announced in *Kusper* v. *Pontikes,* 414 U.S. 51, 58 (1973), any application of a statute which constitutes a "substantial restraint" or "significant interference" with the exercise of fundamental rights is unconstitutional unless it is necessary to promote some compelling state interest. *See also, NAACP* v. *Alabama ex rel. Patterson,* 357 U.S. 449 (1958); *Bates* v. *Little Rock,* 361 U.S. 516 (1960). Because fundamental rights guaranteed by the First and Fourteenth Amendments are here involved, i.e., a political party's right to freedom of association, this court is called upon to strictly scrutinize the constitutionality of Michigan's primary election law as it applies to the state Democratic Party.

B.

As a preliminary matter, the court notes that under state law, national political parties receiving greater than five per cent of the total vote cast in the last nationwide presidential election are compelled to employ the state primary election as the means by which national convention delegates are chosen. (M.C.L.A. §168.613, M.S.A. §6.1613). Moreover, Section 618 of the Act makes it indisputable that Democratic Party participation in the state primary would not only be mandatory, but also exclusive. Section 618 reads in part:

> "Sec. 618. The allocation of all delegates and alternates to a national convention shall be made by the state central committee of each party *in accordance with the provisions of this act* and shall be certified to the secretary of state..." (Emphasis added.)

The conclusion that the disputed state election laws are both exclusive and compulsory finds added support in other sections. Section 619, for example, reads in part:

> "Sec. 619. (1) National convention delegates *elected pursuant to this act* shall be elected on a basis that insures that the proportion of the total national convention delegation that is uncommitted or is committed to each presidential candidate equals, as near as is practicable, the proportion of the popular vote that was cast as uncommitted or for each respective presidential candidate of the particular political party's total popular vote." (Emphasis added.)

Moreover, under Section 620:

> "Sec. 620. All rules, procedures, allocation of national delegates, additional qualifications for delegates and delegations of authority, by any state central committee under the provision of this act relating to presidential primary elections, shall be filed with the secretary of state no later than December 31 of the year preceeding the presidential election..."

Where the state central committee of any political party obliged to participate in the presidential primary election pursuant to Section 613 fails to file its rules and procedures for the allocation of national delegates under Section 620, the Secretary of State is thereafter empowered to issue them "to the extent necessary" for the appropriate implementation of the primary.

C.

Due to the fact that the state's primary election laws are both mandatory and exclusive as applied to the Democratic Party in this case,[9] this court must interpret their constitutionality in light of *Cousins* v. *Wigoda, supra.*

In that case, 59 persons from the City of Chicago were elected as uncommitted delegates in the March 1972 Illinois primary to represent the State of Illinois at the 1972 Democratic National Convention (Wigoda Delegation). The Wigoda Delegation was challenged before the Credentials Committee of the National Democratic Party by a second slate of delegates (Cousins Delegation). The Cousins Delegation alleged that the slate-making procedures used in placing the Wigoda Delegation on the Illinois ballot violated the guidelines as set forth in the Report of the Commission of Party Structure and Delegates Selection to the Democratic National Committee, which were thereafter incorporated into Article III, Part I, of the Call of the 1972 Democratic National Convention.

On June 30, 1972, the National Party's Credentials Committee sustained the findings of a party-selected hearings officer and chose to unseat the Wigoda Delegates for violations of Party rules. The Cousins Delegation was seated in their place, having been chosen in June at private caucuses held in Chicago.

Two days before the opening of the Democratic National Convention, the Wigoda Delegates obtained an injunction from

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[9] The Democratic Party received more than 5% of the total vote in the previous nationwide presidential election.

the Circuit Court of Cook County, Illinois, enjoining the Cousins Delegation from participating in the Convention. The Cousins Delegates appealed that injunction, and meanwhile attended the Convention in violation of the state court's prohibition. On July 10, 1972, the full convention adopted the recommendations of the Credentials committee and seated the Cousins Delegation, who thereafter voted and otherwise participated in the convention proceedings. In consequence, criminal contempt citations were issued against the Cousins Delegates following their return to Illinois, although adjudication was deferred pending the outcome of the Cousins Delegation's prior appeal.

The Illinois Court of Appeals thereafter upheld the legitimacy of the lower court's injunction, 14 Ill.App. 3d 460, 302 N.E.2d 614 (1973), and leave to appeal was denied by the Illinois Supreme Court. In its opinion, the Illinois appellate court said, at page 626, that "(t)he right to sit as a delegate representing Illinois at the national nomination convention is governed exclusively by the Illinois Election Code." The court further stated at pages 625 to 629:

> "[A]lthough the purposes and guidelines for reform adopted by the Democratic National Party in its Call for the 1972 Democratic National Convention were issued, they in no way take precedence in the State of Illinois over the Illinois Election Code (Ill.Rev. Stat.1971, ch.46,§7-1, *et.seq.*). The opening section of Article 7 of the Election Code, which deals with the making of nominations by political parties (§7-1), is most clear when in discussing the selection of delegates to National nominating conventions, it states:
>
> '...[D]elegates and alternate delegates to National nominating conventions by all political parties...shall be made in the manner provided in this Article 7, and not otherwise."

* * *

> " Because election to the office of convention delegate in Illinois is governed by non-discriminatory state legislation, the instant case is not merely an intraparty factional dispute to be settled by party discipline. In this case, the law of the state is supreme and party rules to the contrary are of no effect.
>
> * * *
>
> The interest of the state in protecting the effective right to participate in primaries is superior to whatever other interests the party itself might wish to protect...
>
> The legislature of the State of Illinois has established election machinery to guarantee the broadest possible citizen and candidate participation in the nomination process by providing for election of delegates to the national conventions. The defendants cannot be permitted to frustrate the state's interest in maximizing that participation. Party rules are not a law unto themselves..."

In conclusion, the Illinois court held that enforcement of the previously-issued injunction did not violate the Cousins delegates' right to freedom of association in preventing their participation at the National Convention.

The United States Supreme Court reversed. Rejecting the claim that the State of Illinois retained a compelling state interest in protecting the integrity of its electoral process, the Court said at 489-490:

> " Respondents argue that Illinois had a compelling interest in protecting the integrity of its electoral processes and the right of its citizens under the State and Federal Constitutions to effective suffrage. They rely on the numerous statements of this Court that the right to vote is a 'fundamental political right, because preservative of all rights.' ...But respondents overlook the significant fact that the suffrage was exercised at the primary election to elect delegates to a National Party Convention. Consideration

> of the special function of delegates to such a Convention militates persuasively against the conclusion that the asserted interest constitutes a compelling state interest. Delegates perform a task of supreme importance to every citizen of the Nation regardless of their State of residence ...The States themselves have no constitutionally mandated role in the great task of the selection of Presidential and Vice-Presidential candidates. If the qualifications and eligibility of delegates to National Political Party Conventions were left to state law 'each of the fifty states could establish the qualifications of its delegates to the various party conventions without regard to party policy, an obviously intolerable result.'...The Convention serves the pervasive national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual State." (Footnotes omitted.)

The Court consequently held that because the Party's interest in the qualifications and eligibility of delegates to its national convention was an interest basic to the protected right of political association, "Illinois' interest in protecting the integrity of its electoral process cannot be deemed to be compelling in the context of the selection of delegates to the National Party Convention." 419 U.S., at 477.

Based on *Cousins* v. *Wigoda, supra,* I conclude that the Michigan presidential primary statute is unconstitutional as applied to the Democratic Party in this case because the Act attempts to exclusively preempt the Party's delegate selection process. For that reason, defendants are under no duty to enforce its provisions in this case.

The Michigan statute in question clearly conflicts with the rules of the Democratic Party governing delegate selection in that there are no restrictions against "cross-over" voting. Under state law, delegates to the National Convention must be selected pursuant to an open primary, contrary to Rule 2A of the Party's Delegate Selection Rules. In its *amicus* brief, the Democratic Party explains, at page 7, that Rule 2A "seeks to

ensure that the votes of Republicans and other non-Democrats do not distort the Party's processes for determining Democrats' candidate preferences." This would appear to be an interest which goes to the very heart of the Party's associational rights. Indeed, there is no interest of greater significance to an association than that of having its leadership selected by its own members.

The National Party considered this right to be so important that it ordered state party central committees, where state law conflicted with Party rules, to erect alternative methods of selecting delegates to the National Convention. No exemptions were permitted. Protection of such crucial interests was surely intended by the Supreme Court in *Cousins* v. *Wigoda, supra.*

Moreover, it has long been established that First and Fourteenth Amendment protection of the rights of free speech and assembly gives rise to a constitutional right to associate with others for the common advancement of political beliefs and ideas. *Kusper* v. *Pontikes, supra,* at 56. The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom. *Williams* v. *Rhodes,* 393 U.S. 23, 30 (1968). The Supreme Court has repeatedly stated that any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. *Sweezy* v. *New Hampshire,* 354 U.S. 234, 250 (1957); *Cousins* v. *Wigoda, supra,* at 487-488; *Buckley* v. *Valeo,* 424 U.S. 1, 22 (1976). As a result, the courts have given broad latitude to political parties to enable them to conduct their own affairs and to settle their own disputes without judicial interference. *See, e.g., Ripon Society, Inc.* v. *National Republican Party,* 525 F.2d 567 (en banc, 1975), *cert. den.* 424 U.S. 933 (1976).

On the other hand, *Cousins* does not stand for the proposition that states have no interest in regulating primary elections. *United States* v. *Classic,* 313 U.S. 299 (1941). State interests in ensuring the integrity of electoral processes has frequently been

treated as significant and compelling. *See, e.g., Storer* v. *Brown*, 415 U.S. 724 (1974). In this respect, the Supreme Court has said: "Moreover, a State has an interest, if not a duty, to protect the integrities of its political processes from frivolous or fraudulent candidacies." *Bullock* v. *Carter*, 405 U.S. 134, 145 (1972).

Here, however, essential rights relating to the freedom of association are abridged. Had cross-over voting not been allowed, Michigan's statutory scheme might well have been constitutional. In the context of this case, however, where state law is both mandatory and exclusive, and where legitimate interests of the national party are infringed, Michigan's "compelling interests" wane.

Political parties play a basic and necessary role in the formation of our national government. To that end, those parties must be permitted to freely define, within the confines of the Constitution, the qualifications of those who are to participate in their basic functions. It is entirely permissible and reasonable for the Democratic Party to decide that only Democrats should vote in primary elections designed to select delegates to a national convention. The Michigan statute does not permit that. For that reason, I find it to be unconstitutional as applied to the Deomocratic Party in this case.[10]

D.

In his complaint, plaintiff seeks a declaration that because the state Democratic Party chose not to honor its obligations under the state's election laws, the defendant Secretary of State is duty-bound to issue, under Section 620, the rules, procedures and other requirements necessary for implementing the primary election.

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[10] The court intimates no judgment concerning the constitutionality of the Michigan presidential primary election law as it pertains to the Republican Party or to any other political association. That question is not now before the court, and nothing in this case is intended to suggest that the Michigan law is constitutionally infirm on its face.

Section 620 of the Michigan primary statute directs the state central committee of each political party for which a presidential primary election is to be held to file with the Secretary of State "all rules, procedures, allocation of national delegates, additional qualifications for delegates, and delegations of authority..." in connection with the primary. If the committee fails to file such rules, "necessary for the appropriate implementation of this act relating to presidential primary elections", the section directs the Secretary of State to issue them "to the extent necessary".

Because the primary law is unconstitutional as applied to the Democratic Party, the Party need not file any rules with the Secretary of State. The Secretary of State, in turn, has not promulgated any rules with respect to the Democratic Party, and he is precluded from doing so to the extent that they define the qualifications and eligibility of delegates to the Democratic National Convention. *Cousins* v. *Wigoda supra.*

By its terms, Section 620 invests the Secretary with discretion to determine whether rules and procedures are "necessary". He has properly determined that implementation of the law here would be unconstitutional. I hold, therefore, that the defendant Secretary of State has fulfilled all of his obligations under Section 620, and I accordingly deny this aspect of plaintiff's request for relief.

III.

Ferency alternatively argues that even if the Democratic Party cannot be forced to participate in the Michigan presidential primary election to be held in May, under state law the Secretary of State has the authority to require the Democrats to select their delegates in state and county conventions rather than by caucus. Ferency bases this argument on the existence of M.C.L.A. §168.611[11], the statute under which delegates to a national convention were elected prior to 1972.

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[11] See footnote 5.

The *amicus,* at oral argument, expressed concern over whether or not Section 611 would similarly violate the Delegate Selection Rules for the 1980 Democratic National Convention. Specifically, the *amicus* noted that at the time the state Party adopted its 1980 delegate selection plan, Section 611 was thought to have to have been effectively repealed due to the mandatory nature of the primary election law. Requiring the state Party to now employ the convention method, it is alleged, would contradict Party rules requiring submission and implementation of state delegate selection plans no later than September 15, 1979.[12]

The court need not resolve that issue at this time. Instead, for the reasons that follow, I hold that the state Democratic Party cannot be compelled to implement the convention method of picking delegates where the primary election statutes are held not to apply.

In the original 1972 enactment of the presidential primary election law, the state legislature included a provision designed to require minor parties to elect their national convention

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[12] Amicus brief on Rule 1B of the Delegate Selection Rules, which reads, in part, as follows:

> 1. PUBLICATION AND SUBMISSION OF STATE PARTY RULES.
>
> * * *
>
> B. Each State Party shall adopt an Affirmative Action Plan and a Delegate Selection Plan which shall be submitted to the Compliance Review Commission for approval on or before April 15, 1979.* Such Plan shall be consistent with National Party Rules. The Affirmative Action Plans shall include provisions for the appointment of a representative State Affirmative Action Committee and for the implementation by Party organizations of Affirmative Action as defined in Rule 6 and Non-Discrimination as defined in Rule 5. In the six (6) months prior to the first step of the delegate selection process, each state Affirmative Action Plan shall give special attention to encouraging participation by the dissemination of information about the delegate selection process....

delegates by way of state conventions held pursuant to Section 611. This section, as embodied in M.C.L.A. §168.617, read in part as follows:

> "Political parties not participating in the presidential primary shall elect their delegates and alternates as provided in Section 611."

In 1975, the state legislature amended the state's presidential primary election law to accomodate inconsistencies created by recently-adopted national party rules.[13] Among the changes incorporated in the amendments was repeal of Section 617. Section 611 was retained.

The legislative analysis accompanying the 1975 amendment expressly discussed the origin of the specific changes made in the primary election law. In each case, the changes made originated from party rules which contradicted existing statutory provisions. However, the repeal of Section 617 was unexplained, suggesting that the legislature's action was unrelated to any conflict over party rules. As a result of this repeal, no clear statements exist concerning the state's interest in supervising delegate selection systems for parties not participating in the primary election.

For this reason, I find that the state legislature did not intend to retain the convention method of selecting delegates as an alternative to a primary election. This is not to say that the legislature is powerless to require party implementation of state conventions. In the present case, however, there is no reason to believe that the state legislature intended Section 611 to be an inviolate alternative. Plaintiff's request for a declaration that the Michigan Democratic Party is obliged to elect delegates pursuant to Section 611, instead of in party-run caucuses as planned, is consequently denied.

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[13] The State House of Representatives, through its analysis division, in fact expressly supported the amendments as necessary under the then-recent Supreme Court decision in *Cousins* v. *Wigoda, supra.* The House read *Cousins* as ruling that Party rules take precedence over state election laws. (*See,* Report of the Michigan House of Representatives, Analysis Division concerning S.B. 1196 (unpublished), issued 12/15/75).

IV.

Plaintiff next contends that even if the Democrats in this case cannot be forced to utilize a state convention or a primary election as a means of choosing their delegates to the Democratic National Convention, the state nevertheless has superintending authority to police the party-run caucuses expected to be held on April 26 and May 3, 1980. Ferency maintains that the caucuses are "elections" under state law which bring them within the purview of the defendants' statutory authority. For this reason, plaintiff requests this court to declare that the rules and procedures which the Democratic Party intends to implement at the upcoming caucuses contradict state law, as well as voters' state and federal constitutional rights. Specifically, plaintiff seeks a ruling that the Democratic Party cannot bar non-Democrats from the caucuses, that they cannot require voters to have enlisted with the Party prior to February 26, 1980, that they cannot permit participation by persons who have not registered to vote in the State of Michigan, and that they cannot require the payment of money (Party dues) as a pre-requisite to voting.[14]

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[14] *Amicus* challenges plaintiff's standing to question Party rules relating to the eligibility of voters to participate in the caucuses. *Amicus* argues that there is no "case or controversy" here, as required under Art. III of the United States Constitution, because plaintiff is eligible to vote in the caucuses, and so is not "aggrieved" by the Party rules.

It is no doubt true that plaintiff must be injured by defendants' acts or omissions before he can claim the right to sue. *See, Warth* v. *Seldin*, 422 U.S. 490 (1975) and this court's opinion in *Kay* v. *Austin*, No. G80-206 CA5 (W.D. Mich 4/18/80) (order denying standing). I find, however, that plaintiff here can assert violations of his interests significant enough to warrant standing.

As a member of the Democratic Party intending to vote at the party caucuses, plaintiff can claim an interest in the full value of his ballot. If non-registered voters are permitted to participate in the caucuses, for example, plaintiff's vote is that much diluted.

Moreover, plaintiff is a member of the Executive Board of the Ingham County Democratic Committee, as well as a duly-elected

(*footnote continues*)

Alternatively, plaintiff alleges that the Democratic State Central Committee is a statutory body established under state law, M.C.L.A. §168.697; M.S.A. §6.1697,[15] and that it performs various duties and exercises certain powers related to the state's electoral processes. For this reason, plaintiff contends that

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(*footnote continued*)
precinct delegate. Plaintiff, therefore, retains an interest, under the state's APA, in ensuring that the caucus procedures he is mandated to enforce under Party rule are not illegal under state or federal law. Plaintiff's request for a declaratory ruling is well within his rights under the Michigan APA and he is permitted to act upon those rights in this court. (See Part I of this opinion, *supra.*)

Moreover, *amicus* is mistaken in relying upon the recent case, *Winpisinger, et al.* v. *Watson, et al.*, F.2d (Case No. 80-1160) (D.C.Cir. 4/10/80). There, plaintiffs sought judicial review of countless executive decisions made by the President and his staff which they allege illegally and adversely affected the Kennedy presidential campaign. Plaintiffs were denied standing in *Winpisinger* because the appellate court concluded, as did the court below, that the plaintiffs were unable to establish a "fairly traceable" causal link between the claimed injury and the challenged conduct. *See, e.g., Duke Power Co.* v. *Carolina Env. Study Group,* 458 U.S. 59 (1978).

In the present case, plaintiff is capable of demonstrating a "fairly traceable" causal link. Specifically, plaintiff can show that the refusal of the Secretary to act, if he is so obligated, dilutes the full value of plaintiff's vote and potentially places the State Democratic Party, of which plaintiff is an officer, in danger of violating state or federal law. Plaintiff merely seeks a ruling by the defendants, and now by this court, concerning the validity of the caucus procedures intended to be used by the Party. Plaintiff has standing to pursue this relief.

[15] M.C.L.A. §168.597 reads:

> Sec. 597. At its spring state conventions in each odd numbered year, each political party shall select a state central committee as herein provided, which committee shall consist of 2 men and 2 women from each congressional district. The state convention shall select a chairman and 2 vice chairmen of the state central committee and such chairman and vice chairmen shall have the right to vote on all questions arising in the committee. The state central committee so constituted shall appoint a secretary and a treasurer and such other officers as in its judgment may be proper and shall have the power to fill any vacancy that may occur in its membership or any of its offices. The term of service of a state central committee shall continue until the election of its successor.

action by the Democratic State Central Committee is "state action", including, in this case, the conducting of party-run delegate selection caucuses. Plaintiff consequently requests a declaration by the court that the Secretary of State has authority to supervise these caucuses because they amount to "state action", and for that reason, that the Secretary of State has a duty to prohibit the Democratic Party from enforcing the procedural rules set out above which plaintiff alleges are in violation of state and federal law.

A.

Plaintiff first contends that "caucuses" are "elections" under state law. I cannot agree. The term "caucus" remains undefined under state law, and no state statute expressly confers statutory authority upon the Secretary of State to supervise their implementation. Plaintiff argues, however, that "caucuses", because they are ultimately used for choosing delegates to national conventions, are really "elections" or "primary elections".

The terms "election" and "primary election" are defined by state law, and the court looks to the sections of the Michigan election law defining those terms for greater clarity. Section 2 of the Act defines "election". It reads:

> " Sec.2. The term 'election', as used in this act, shall mean and be held to include any election and primary election, at which the electors of the state or of any subdivision thereof choose or nominate by ballot public officials or decide any public question lawfully submitted to them. The term 'election' is not synonymous with the term 'civil appointment' as such term appears in section 9 of article 4 of the state constitution."

Although M.C.L.A. §168.2 does not preclude this court from interpreting the term "caucus" to mean an "election", I am not convinced that the language in Section 2 supports such

an interpretation. The state legislature defined election in terms of state electors deciding public questions and nominating public officials for office. In the caucuses soon to be held by the Democrats, however, members of a private association will meet to pick the candidate best suited to represent their party. While this has "public" implications for the upcoming November election, this is not a "public" question for purposes of Section 2.

Section 7 of the Act defines "primary election". That section reads:

> " Sec. 7. The term 'primary' or 'primary election', as used in this act, shall mean a primary election held for the purpose of deciding by ballot who shall be the nominees for the offices named in this act, or for the election by ballot of delegates to political conventions."

Whether or not a "caucus" is a "primary election" under state law is a more difficult question. In the same way that "election" was defined in Section 2, "primary election" is defined in Section 7 by repeating the term in its definition. A "primary election" under state law is a "primary election" held for the purpose of electing candidates to political conventions. There is no reference, however, to "caucus", and that term is notably absent from the statute.

Given the ambiguous nature of the language used in Section 7, it would not be entirely unreasonable to conclude that the state legislature intended to treat caucuses as primary elections. On the other hand, in *Cousins* v. *Wigoda, supra,* the Supreme Court emphasized the important role state political parties play in the national scheme of electing a president. In that opinion, Justice Brennan expressly stated, at 498-490:

> " (T)he state political parties are 'affiliated with a national party through acceptance of the national call to send state delegates to the national convention.' *Ray* v. *Blair,* 343 U.S. 214, 225 (1952). The States themselves

> have no constitutionally mandated role in the great task of the selection of Presidential and Vice-Presidential candidates....The Convention serves the pervasive national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual State."

Because state parties play such a unique role in the national political process, I am not convinced that state authority to supervise meetings and caucuses of state political associations exists absent an express statement of intent by the legislature. The legislature may freely define "primary election" to include "caucus". In this case, however, it chose not to, even though it was well aware, in October, 1979, that the state Democratic Party intended to elect convention delegates by way of caucus vote. Failure by the state to expressly include "caucus" within the purview of its supervisory authority, along with the Secretary of State's refusal to police the upcoming Democratic Party gatherings, convinces me that the State in this case did not intend to make "caucuses" elections under state law.

Nor do I find *Thorne* v. *Jones,* 335 Mich. 658 (1953) to be controlling. In that case, a township clerk sought a declaratory ruling concerning the legality of a candidate's running for public office on the ticket of more than one political party. Under one provision of the state's election law, candidates in caucuses were prohibited from running under the auspices of two different political parties. This same prohibition was not included, however, under a provision outlining candidacy requirements in state primary elections.

The Supreme Court of Michigan held that in order to prevent candidates' names from appearing more than once on a primary ballot for a particular public office, a "caucus" would be taken to include a "primary election". In this way, rules prohibiting multiple candidacies in caucus elections would be applied in the same way to candidacies in primary elections.

In *Thorne*, the plaintiff was asking the court to interpret the then-existing state statutes regulating primaries to mean the same as the then-existing state statutes regulating caucuses. Plaintiff requested relief in order to prevent a fraudulent primary election, just as the legislature had already demonstrated a desire to prevent fraudulent caucus elections. In this case, however, no state statute currently exists which attempts to regulate caucuses. Also, the legislature has not demonstrated in any way a desire to supervise caucus elections of the type currently before the court. Unlike *Thorne*, plaintiff here is not asking this court to interpret statutes relating to caucuses so that fraud will be prevented. Plaintiff instead requests this court to interpret state regulation of primary elections to permit the Secretary of State to supervise an area (caucuses) the legislature itself has not seen fit to regulate. This is an entirely different question from that involved in *Thorne*. For that reason, I find the case to be distinguishable.

B.

Whether decisions and actions of political parties in selecting delegates to their national conventions amount to "state action" is a question expressly reserved by the Supreme Court in *Cousins v. Wigoda, supra,* at 483 n.4. In the case now at hand, however, this court is directly faced with that issue. Given the present set of circumstances, and for the reasons that follow, I conclude that state Democratic Party's implementation of party caucuses is not "state action", and I deny plaintiff's request for declaratory relief.

Preliminarily, it is important to note that the court is not faced here with the situations involved in other cases where delegate selection processes were said to involve "state action". *See, Terry* v. *Adams,* 345 U.S. 461 (1953); *Smith* v. *Alwright,* 321 U.S. 649 (1944); *United States* v. *Classic, supra.* In those cases, the state authorities had actively and directly conducted

or regulated the delegate selection processes in primary elections pursuant to properly-enacted state legislation. Here, however, the Democratic State Central Committee has decided to implement caucus-selection systems in seeming contradiction to state law, and without the approval or imprimatur of state officials.

The Democratic Party's actions in this case are purely private activities. The state is not conducting or regulating these party caucuses, nor is the party acting pursuant to or on behalf of the state. This court has already determined that no state statute exists which governs the holding of party caucuses. No reason exists to conclude under the facts of this case that the Democratic Party in this case is acting as an arm of the state.

In addition, I agree with the statement of the court in *Graham* v. *Fong Eu,* 403 F.Supp. 37, 44 (N.D.Ca. 1975), *aff'd* 403 U.S. 1067 (1976), where it said:

> " The Constitution does not require that voters be afforded an opportunity to participate at either final or preliminary stages in the nomination process for presidential candidates. Whether the voters will participate in the delegate selection process, and, if so, at what stage, and whether their participation will be translated directly into delegate representation at the national convention are matters for the political parties themselves to determine, and, if the parties permit it, for the state." (Footnotes omitted.)

Given the clear absence of direct state involvement, I find that the activities of the Michigan Democratic Party, relative to the upcoming party caucuses, to be political activity unrelated to state regulations. For this reason, I find that the upcoming

caucuses are not "state action" for purposes of plaintiff's complaint.[16]

C.

Plaintiff has not shown that the state party caucuses are either "elections" or "state action" under state law. I conclude, therefore, that the Secretary of State has no authority under state law to supervise the implementation of party caucuses. The Secretary of State has authority to administer the election laws of the State of Michigan.[17] He does not have the authority

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[16] Nor do I believe that just because the Democratic State Central Committee exists pursuant to state law (M.C.L.A. §168.597), "state action" necessarily exists. In *Marchioro* v. *Chaney,* 442 U.S. 191 (1978), the Supreme Court upheld as constitutional a state statute requiring political parties to have state central committees, even where a party resists that requirement. The statutorily required existence of a political party's central committee, therefore, is not necessarily relevant to the party's intent to operate as an arm of the state, or the legislature's right to make that party's acts "state action".

[17] The authority arises under M.C.L.A. §168.32:

> Sec. 31. The secretary of state in addition to other powers and duties conferred upon him shall have the power and it shall be his duty:
>
> (1) Rules, regulations and instructions. To prepare rules, regulations and instructions for the conduct of elections and registrations in accordance with the laws of the state;
>
> (2) Advice to local election officials. To advise local election officials upon request as to the proper methods of conducting elections;
>
> (3) Manual of instructions. To publish and furnish for the use in each election precinct prior to each state primary and election a manual of instructions;
>
> (4) Pamphlet copies of registration, primary and election laws; distribution. To publish indexed pamphlet copies of the registration, primary and election laws and to furnish to the

(*footnote continues*)

to supervise or administer "election" processes of purely private associations. For this reason, I deny plaintiff's request for a declaratory ruling concerning the legality and constitutionality of eligibility requirements for participation in the party caucuses.

(*footnote continued*)

various county, city, township and village clerks a sufficient number of copies for their own use and to enable them to include 1 copy with the election supplies furnished each precinct board of election inspectors under their respective jurisdictions, and he may furnish single copies of the publications to organizations or individuals who request the same for purposes of instruction or public reference;

(5) Forms, notices and supplies. To prescribe and require such uniform forms, notices and supplies as he shall deem advisable for use in the conduct of elections and registrations;

(6) Form of ballot; amendment to constitution, initiative, referendum. To prepare the form of ballot for any proposed amendment to the constitution or proposal under the initiative or referendum provision of the constitution to be submitted to the voters of the state;

(7) Reports from local election officials. To require such reports from the local election officials as may be deemed necessary;

(8) Investigation and report of election law violations. To investigate, or cause to be investigated by local authorities, the administration of election laws, and to report violations of election laws and regulations to the attorney general or prosecuting attorney, or both, for prosecution; and

(9) Legislative manual, publication of votes, further information. To publish in the legislative manual the vote for governor and secretary of state by townships and wards and the vote for members of the state legislature cast at the preceding November election, which shall be returned to the secretary of state by the several county clerks on or before the first day of December following such election, and it shall be the further duty of all clerks to furnish to the secretary of state, promptly and without compensation, any further information requested of them, to be used in the compilation of the manual.

V.

Ferency lastly requests a ruling by this court that persons voting in the upcoming party caucuses are prohibited from then voting in the May primary election. He bases this claim on M.C.L.A. §168.931(j), which reads:

> "(j) No person shall offer or attempt to vote more than once at the same election either in the same or in another voting precinct, nor shall he give two or more votes folded together."

Plaintiff misconstrues Section 931(j) because, on its face, it prohibits double-voting in the "same election". Since caucuses are not elections under state law, there can be no violation of Section 931. Plaintiff's claim for relief is consequently denied.

VI.

For the reasons set out above, plaintiff's motion for declaratory relief is denied. Accordingly, plaintiff's complaint is dismissed.

Douglas W. Hillman
District Judge

Dated: April 21, 1980.

No. 79-1631

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DEMOCRATIC PARTY OF THE UNITED STATES OF AMERICA AND DEMOCRATIC NATIONAL COMMITTEE
Appellants,

v.

WISCONSIN EX REL. BRONSON C. LA FOLLETTE, AND DEMOCRATIC PARTY OF WISCONSIN
Appellees.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

JOINT APPENDIX

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State of Wisconsin

Supreme Court

STATE OF WISCONSIN *ex rel.*
BRONSON C. LA FOLLETTE,
Petitioner-Appellant,

v.

79-1328-0A

DEMOCRATIC PARTY OF THE UNITED STATES OF AMERICA, DEMOCRATIC NATIONAL COMMITTEE, AND DEMOCRATIC PARTY OF WISCONSIN,
Respondents.

DEMOCRATIC PARTY OF THE UNITED STATES OF AMERICA, *et al,*
Appellants,

v.

BRONSON C. LA FOLLETTE, *et al,*
Respondents.

Probable jurisdiction is noted in Supreme Court of the United States

79-1631

DOCKET ENTRIES

Document	Date
Petition for Leave to Commence Original Action	Aug. 29, 1979
Answer of the Democratic Party of United States of America	Sept. 24, 1979
Answer of the Democratic Party of Wisconsin	Sept. 24, 1979
Answer of Democratic Party of the United States of America and Democratic National Committee	Oct. 11, 1979
Order of Supreme Court of Wisconsin (setting oral argument on question of taking original jurisdiction)	Aug. 31, 1979
Order of Supreme Court of Wisconsin (setting briefing schedule and order for oral argument)	Sept. 12, 1979
Decision of Supreme Court of Wisconsin	Jan. 19, 1980

State of Wisconsin

In Supreme Court

STATE OF WISCONSIN EX REL.
BRONSON C. LA FOLLETTE,
Petitioner,

v.

DEMOCRATIC PARTY OF THE UNITED STATES OF AMERICA,
DEMOCRATIC NATIONAL COMMITTEE,
AND
DEMOCRATIC PARTY OF WISCONSIN,
Respondents.

PETITION FOR LEAVE TO COMMENCE AN ORIGINAL ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF

TO: THE SUPREME COURT
STATE OF WISCONSIN AND
THE HONORABLE JUSTICES THEREOF

Your petitioner hereby respectfully prays this Honorable Court for leave to commence an original action for declaratory and injunctive relief to enforce state law with respect to a controversy, the facts of which follow.

1. Petitioner Bronson C. La Follette is the Attorney General of Wisconsin. He brings this action on behalf of the sovereign State of Wisconsin, pursuant to the authority of its Governor, *see* Exhibit A, and on behalf of the citizens of the State of Wisconsin, *see* sec. 165.25(1), Stats., to preserve the voting rights of Wisconsin citizens under state law.

2. Respondent Democratic Party of the United States of America (hereafter "National Party") is a voluntary

unincorporated association and a national political party whose purposes include: (a) nominating and assisting in the election of candidates to the office of President of the United States of America; (b) assisting state and local Democratic Party organizations in the election of their candidates and the education of their voters; and (c) working with Democratic public officials at all levels to achieve the objectives of the National Party. The National Party regularly does business in the State of Wisconsin by its agents, including the respondent Democratic Party of Wisconsin. Its business address is 1625 Massachusetts Avenue, N.W., Washington, D.C. 20036.

3. Respondent Democratic National Committee (hereafter "DNC") is an agent of the respondent National Party and has power to implement the National Party's purposes and rules including the power to impose requirements to be followed by state parties, including the respondent Democratic Party of Wisconsin, in respect to sending delegates to the quadrennial national convention to choose the National Party's candidate for the office of President of the United States. Its business address is the same as that of the respondent National Party.

4. Respondent Democratic Party of Wisconsin (hereafter "State Party") is a voluntary unincorporated association and a political party doing business in Wisconsin. It associates with the respondent National Party to achieve, among other things, the purposes described in paragraph 2 above. Its business address is 126 South Franklin, Madison, Wisconsin 53703.

5. Wisconsin has an Open Primary Law. Secs. 5.37(4); 5.60(8) (intro.), (c) and (d); and 8.12, Stats. This law provides that in presidential election years each voter in Wisconsin shall have an opportunity to express his or her preference in the primary election for a candidate for the office of President of the United States of America; that any voter may cast a private ballot without publicly declaring his or her party preference and without having that preference pulicly recorded; that political parties select their own delegates; that

the candidate for President who receives a plurality of the presidential primary vote in any district or in the state at large is entitled to control all the delegates representing such an area, but that as an alternative the chairperson of a state political party may have delegates pledged to candidates on the basis of the proportion of the presidential primary vote each candidate receives; and that each delegate to the party's national convention, however chosen by the political party involved, must execute an affidavit which pledges his or her vote in accordance with the outcome of the presidential primary vote and which states that he or she is affiliated with the political party which selected him or her as a delegate to its national political convention.

6. On June 9, 1978, the respondent DNC promulgated certain rules, attached hereto as Exhibit B. Under these rules, delegates selected by respondent State Party cannot be bound by the results of the State of Wisconsin Democratic presidential primary election for the sole reason that voters in the primary are not restricted to persons who publicly declare and record that their party preference is the State Party or the National Party.

7. The DNC rules conflict with the Open Primary Law in two respects. First, the rules restrict participation in the State of Wisconsin Democratic presidential primary to those voters who publicly declare and record their allegience to the State or National Democratic Party. Second, the rules measure candidate strength only by the votes of publicly declared and recorded Democrats; the votes of other Democrats and non-Democrats are disregarded.

8. Respondent State Party is required by its association with the National Party to comply with the terms of the DNC rules, Exhibit B. The State Party has decided to comply with DNC rules rather than Wisconsin law.

9. Respondents have instituted a caucus system to displace the open primary election.

10. Respondents know their plan is contrary to state law. Nevertheless, they are implementing an alternative party-run system to determine candidate strength, in violation of Wisconsin law, by establishing a caucus procedure which will select a slate of delegates, not bound by the results of the Wisconsin primary, to be seated at the 1980 convention of the National Party.

11. The Compliance Review Commission, an agent of the respondents National Party and DNC, has been delegated authority by the National Party and the DNC to determine whether state parties are in compliance with the DNC rules. It has determined that the State Party is not in compliance with the DNC rules if the State Party complies with the Open Primary Law.

12. Respondents' conduct, unless enjoined, will deny Wisconsin voters the benefits of the Open Primary Law, which include: giving voters an effective voice in selecting the President of the United States; attracting national candidates to Wisconsin to appeal to said voters, thereby securing an informed electorate; and securing to voters a right of privacy in respect to affiliation with parties and with candidates for the office of President of the United States of America.

13. The issue presented to this court requires a speedy and definitive resolution. This issue is of great public importance because it concerns state-granted voting rights; it concerns the state's use of political parties as its agents to effectuate voter choice for President; and it concerns the state's ability to secure to its citizens the benefits described in paragraph 12 hereof.

WHEREFORE, petitioner prays this Honorable Court for leave to file this petition and complaint so as to institute an original action in this Court to enforce state law; and for judgment declaring that sec. 8.12, Stats., requires that delegates selected by the State and National Parties from Wisconsin execute the pledge of sec. 8.12(3)(c)5., Stats., in accordance with state law and the results of the presidential preference

primary; and enjoining the respondents from conducting a caucus which has as a purpose to defeat the operation of the Open Primary Law; and enjoining respondents from recognizing any persons as Wisconsin delegates to the national convention in 1980 unless those persons have pledged to honor the outcome of the presidential primary as required by the Open Primary Law; and enjoining respondents from refusing to seat Wisconsin delegates at convention by reason of their compliance with the Open Primary Law.

Dated at Madison, Wisconsin, this 29th day of August, 1979.

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State of Wisconsin

In Supreme Court

STATE OF WISCONSIN EX REL.
BRONSON C. LA FOLLETTE,
Petitioner,

v.

DEMOCRATIC PARTY OF
THE UNITED STATES OF
AMERICA,
DEMOCRATIC NATIONAL
COMMITTEE, and
DEMOCRATIC PARTY OF
WISCONSIN,
Respondents.

ANSWER OF THE DEMOCRATIC PARTY OF THE UNITED STATES OF AMERICA AND THE DEMOCRATIC NATIONAL COMMITTEE

Pursuant to the Court's order dated September 12, 1979, Respondents Democratic Party of the United States of America and the Democratic National Committee (hereinafter collectively "National Democratic Party") answer the complaint filed by the State of Wisconsin by its Attorney General (hereinafter "State"). The numbered paragraphs in this Answer correspond to the numbered paragraphs in the State's "Petition for Leave to Commence An Original Action For Declaratory and Injunctive Relief" dated August 29, 1979, which the Court ruled stands as the complaint.

1. The National Democratic Party admits that Bronson C. La Follette is the Attorney General of Wisconsin and that he has brought this action on behalf of the State of Wisconsin pursuant to the authority of its Governor and on behalf of the

citizens of the State of Wisconsin. The balance of paragraph 1 of the State's Petition is argumentative and need not be answered.

2. The National Democratic Party admits the allegations in paragraph 2; except that it denies that it regularly does business in the State of Wisconsin by its agent and further denies that the Respondent Democratic Party of Wisconsin is an "agent" of the National Democratic Party in the sense that there exists a principal-agent relationship for all purposes under the law of Wisconsin or the District of Columbia.

3. The National Democratic Party admits that the Democratic National Committee ("DNC") has the same business address as the Democratic Party and that the DNC has the power to implement the National Party's purposes and rules; however, the characterization of the DNC as an "agent" of the Democratic Party of the United States of America in the sense that there exists a principal-agent relationship for all purposes is inappropriate. The National Democratic Party denies the other allegations in paragraph 3; however, the State party must comply with the terms of the Delegate Selection Rules to have its delegates seated at the 1980 National Democratic Convention and entitled to vote in the selection of the Party's Presidential and Vice-Presidential nominees.

4. The allegations in paragraph 4 do not apply to the National Democratic Party and, hence, need not be answered.

5. The National Democratic Party admits that Wisconsin has enacted Secs. 5.37(4); 5.60(8) (intro.), (c) and (d); and 8.12, Stats. Because the statutes speak for themselves, the National Democratic Party has no need to affirm or deny the balance of paragraph 5.

6. The National Democratic Party admits that the DNC promulgated the Rules attached as Exhibit B to the Petition on June 9, 1978. It denies the other allegations in paragraph 6; but states that under the Rules, participation in the delegate

selection process in binding primaries, conventions, or caucuses must be restricted to Democratic voters who publicly declare their party preference and have that preference publicly recorded. Furthermore, the Rules require that delegates to the 1980 Democratic National Convention be chosen so as to reflect fairly the division of preferences by those who participate in a Presidential nominating process.

7. The National Democratic Party denies the allegation in the first two sentences of paragraph 7. As to the last sentence, the National Democratic Party will recognize only those delegate votes at the 1980 Convention which are the product of delegate selection processes, whether in binding primaries, conventions, or caucuses, which are restricted to Democratic voters who publicly declare their party preference and have that preference publicly recorded.

8. The National Democratic Party denies the allegations in the first sentence of paragraph 8; however, the State party must comply with the terms of the Delegate Selection Rules to have its delegates seated at the 1980 National Democratic Convention and entitled to vote in the selection of the Party's Presidential and Vice-Presidential nominees. The National Democratic Party cannot affirm or deny the allegation in the second sentence.

9. The National Democratic Party cannot affirm or deny the allegation in paragraph 9.

10. The National Democratic Party does not have sufficient information to affirm or deny the allegations in paragraph 10.

11. The National Democratic Party admits the allegations in paragraph 11; except that it denies that the Compliance Review Commission is its agent for all purposes.

12. The allegations in paragraph 12 are argumentative and need not be answered.

13. The allegations in paragraph 13 are argumentative and need not be answered; except that the National Democratic Party agrees that the issues require a speedy resolution.

AFFIRMATIVE DEFENSE

The injunctions that the State seeks against the National Democratic Party may not be entered, because they would violate the First and Fourteenth Amendments of the United States Constitution.

Dated this 21st day of September, 1979.

Respectfully submitted,

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State of Wisconsin

In Supreme Court

STATE OF WISCONSIN EX REL.
BRONSON C. LA FOLLETTE
Petitioner,

vs.

Docket No.
79-1328-0A

DEMOCRATIC PARTY OF THE
UNITED STATES OF AMERICA,
THE DEMOCRATIC NATIONAL
COMMITTEE AND THE DEMOCRATIC
PARTY OF WISCONSIN,
Respondents.

ANSWER TO COMPLAINT OF BRONSON C. LA FOLLETTE AS ATTORNEY GENERAL AND CROSS CLAIM OF DEMOCRATIC PARTY OF WISCONSIN AGAINST ITS CO-RESPONDENTS DEMOCRATIC PARTY OF THE UNITED STATES OF AMERICA AND THE DEMOCRATIC NATIONAL COMMITTEE

The respondent DEMOCRATIC PARTY OF WISCONSIN by FRIEBERT & FINERTY, its attorneys, by ROBERT H. FRIEBERT, admits, denies and alleges as follows:

1. Admits Paragraph 1 of the Petition of the Attorney General.

2. Admits Paragraph 2 of said Petition and in addition thereto alleges that the National Party also does business in the State of Wisconsin through the respondent State Party by the periodic utilization of the State elections process including deriving the benefit of the services of certain officials of the State of Wisconsin including its Secretary of State and the entire election apparatus maintained by that office, the utilization of

voting machines and ballots located in the State of Wisconsin and the utilization of the services of local officials in both primary and general elections for purposes of tabulating the voting in such elections and compiling the results.

3. Admits Paragraph 3 of the Petition of the Attorney General and alleges in that regard that the rules of the DNC not only include the power to impose requirements to be followed by State Parties but in fact have conditioned the continued affiliation of the State Party with the National Party with respect to the process of nominating its candidates for President and Vice President of the United States upon compliance with all of its rules, including those referred to in the Complaint on file herein.

4. Admits the allegations contained in Paragraph 4 of the Attorney General's Complaint.

5. Admits the allegations contained in Paragraph 5 of the Attorney General's Complaint.

6. Admits the allegations contained in Paragraph 6 of the Attorney General's Complaint.

7. Admits the allegations contained in Paragraph 7 of the Attorney General's Complaint.

8. Admits that the respondent State Party is required by its association with the National Party to comply with the rules of the DNC to obtain recognition and seating of its delegates to the National Convention, but denies that the State Party has decided to comply with DNC rules rather than Wisconsin law; alleges that subsequent to the filing of the Petition by the Attorney General of the State of Wisconsin, the Administrative Committee of the Democratic Party of Wisconsin by advisory resolution adopted the following motion in an emergency meeting:

> "Move that the caucus plan as previously adopted be rejected by the Administrative Committee of the

> Democratic Party of Wisconsin; that we [the Administrative Committee] support the open primary; and that delegates to the 1980 National Democratic Convention be selected in the same manner as they were in 1976."

The State Party has always wished to comply with Wisconsin law while at the same time maintain its affiliation with the corespondents National Party and DNC.

9. Denies that the respondent State Party has instituted a caucus system to displace the open primary election and alleges in that regard that the Administrative Committee of the Democratic Party initially adopted a resolution authorizing the implementation of a caucus plan when the Wisconsin Legislature refused to close the open primary, as an alternative to obtaining delegates which it knew would be seated at the quadrennial national convention of the respondent National Party but since the institution of the above captioned action has reversed the original action of its Administrative Committee as set forth in Paragraph (8) above. The Administrative Committee of the Democratic Party of Wisconsin will be meeting on Saturday, September 29, 1979 for the purpose of formulating its official position with respect to the issues involved in these proceedings.

10. Admits that the caucus system, if utilized as required by the respondent DNC, would be contrary to State law but denies that the respondent State Party has done anything contrary to State law or has in the past or will in the future violate Wisconsin law in any fashion; alleges in that regard that the respondent State Party has made good faith efforts to attempt to comply with Wisconsin law while at the same time attempting to implement a system of alternative plans to satisfy the requirements of the respondent DNC for purposes of maintaining its affiliational ties with respondent DNC and respondent National Party so that the slate of delegates selected in compliance with Wisconsin law will be seated by the 1980

convention of the Democratic National Party; alleges that the respondent State Party will act in accordance with the rules of the DNC for purposes of maintaining its affiliational ties but will not in any manner cooperate with the DNC for purposes of circumventing the Wisconsin open primary law.

11. Admits the allegations contained in Paragraph 11 of the Attorney General's Complaint.

12. Admits the allegations contained in Paragraph 12 of the Attorney General's Complaint and affirmatively alleges that the respondent State Party is desirous of obeying Wisconsin law in all regards while at the same time preserving its affiliational ties with the respondent DNC and respondent National Party whose rules will not accept a slate of delegates elected under the Wisconsin open primary law.

13. Admits the allegations contained in Paragraph 13 of the Attorney General's Complaint and alleges that the dispute set forth in the Petition is ripe for determination because a resolution by this Court will conclude all issues in the dispute and that all parties necessary to a resolution of such issues are present before the Court; that further the respondent DNC has already notified the respondent State Party that if the State Party relies upon the open primary for delegate selection, such delegation if sent to the 1980 national convention will not be recognized and therefore candidates who may be considering entering their names in the Wisconsin Presidential Primary should be afforded ample opportunity to decide whether or not they will file petitions to have their names included in the primary pursuant to §8.12(1)(b) and candidates of national prominence who may be placed on the Wisconsin primary ballot by the Special Certification Committee authorized so to do under §8.12(1) will have an opportunity to make a meaningful decision as to whether or not they wish to disclaim their intention to become a candidate for the office of President of the United States in accordance with such section.

CROSS CLAIM OF RESPONDENT DEMOCRATIC PARTY OF WISCONSIN

And as and for a cross claim against the respondents National Party and DNC, the State Party alleges and shows to the Court as follows:

14. The respondent State Party is affiliated with the National Party.

15. That as a result of the aforesaid affiliation the State Party is subject to the rules of the National Party, which rules are enforced by the respondent DNC particularly with regard to the management of the National Convention of the National Party.

16. That the respondent State Party is also, through its citizen members and as a voluntary unincorporated association, subject to the laws of the State of Wisconsin including the Wisconsin open primary law which although not a penal statute designates the exclusive manner for the conduct of the Wisconsin open primary in the year in which electors for President and Vice President are to be elected.

17. That such law requires the respondent State Party, and all other political parties to determine the apportionment of delegates for candidates for President of the United States pursuant to and in accordance with the results of the Wisconsin open primary.

18. That the rules of the respondent DNC as presently formulated, for the selection and seating of delegates at the National Party convention, do not recognize the Wisconsin open primary and as such the National Party will only recognize a Wisconsin delegation to the National Convention of the National Party which is chosen in violation of the Wisconsin open primary law.

19. That the respondent State Party through its Administrative Committee recognizes and believes that the National Party as well as the State Party enjoy significant interests

pursuant to the First Amendment of the Constitution of the United States to regulate their own internal affairs without undue governmental intrusion, while at the same time the State Party also recognizes that the State of Wisconsin has a legitimate interest to insure that the elections, including the primary election, are conducted in a fair and orderly fashion and to implement this interest by regulating the participation of political parties in the electoral process when such regulations do not create a substantial burden upon the First Amendment rights of the parties.

20. That the respondent State Party through its Administrative Committee believes that the Wisconsin open primary law does not place a substantial or undue burden upon its First Amendment rights and further that the Wisconsin open primary law constitutes a legitimate exercise of the interest of the State of Wisconsin in regulating the orderly participation of political parties in the electoral process and is desirous of following the dictate of Wisconsin law without offending the regulations of the respondent DNC nor severing its affiliational ties with the respondent National Party nor otherwise effect or diminish the associational rights of the members of the State Party with the respondent National Party in connection with the 1980 National Convention and all preliminary proceedings and organizational meetings leading thereto or organized and held in connection therewith; but that such associational ties are jeopardized should the respondent State Party follow Wisconsin law as set forth in §8.12, Wis. Stats. and thereby be found by the respondent DNC to be in violation of regulations adopted for the seating of delegates for the participation in the National Convention; that the Democratic Party of Wisconsin intends to select and send a delegation to the National Convention chosen pursuant to the Wisconsin open primary law and that the National Party has stated that such a delegation will not be allowed to participate in the National Convention; that the matter of associational ties between the State Party and its members with the respondent National Party cannot be determined and properly protected in the claims set forth by the

petitioner since the primary interest of the petitioner is enforcing Wisconsin law for the benefit of all parties and not necessarily in protecting associational ties of the respondent State Party and its members with the respondent National Party.

WHEREFORE, the respondent State Party prays that in addition to such relief as may be granted upon the petition of the Attorney General of Wisconsin, this Court further declares that the Wisconsin open primary law does not intrude upon the associational freedoms of any of the respondents and that in the event there is a determination that the rules of the respondent DNC as presently formulated violate Wisconsin law the respondents National Party and DNC be additionally ordered and adjudged to recognize the delegation of the respondent State Party selected in accordance with Wisconsin law and that the members of respondent State Party be afforded the permission of the respondents National Party and DNC to participate in the entire nominating process associated with the 1980 Democratic National Committee together with such additional and other relief as may be just and proper under the circumstances.

Dated at Milwaukee, Wisconsin this 24th day of September, 1979.

FRIEBERT & FINERTY

By: _____

ROBERT H. FRIEBERT

Attorneys for Respondent
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State of Wisconsin

In Supreme Court

STATE OF WISCONSIN EX REL.
BRONSON C. LA FOLLETTE
Petitioner,

VS.

Docket No.
79-1328-OA

DEMOCRATIC PARTY OF THE
UNITED STATES OF AMERICA
THE DEMOCRATIC NATIONAL
COMMITTEE AND THE DEMOCRATIC
PARTY OF WISCONSIN,
Respondents.

ANSWER OF THE DEMOCRATIC PARTY OF THE UNITED STATES OF AMERICA AND THE DEMOCRATIC NATIONAL COMMITTEE TO THE CROSS CLAIM OF DEMOCRATIC PARTY OF WISCONSIN

Pursuant to Rule 809.84 and sec. 802.06(1), Stats., Respondents Democratic Party of the United States of America and the Democratic National Committee (hereinafter collectively "National Democratic Party") answer the cross claim filed by the Democratic Party of Wisconsin (hereinafter "State Party"). The numbered paragraphs in this Answer correspond to the numbered paragraphs in State Party's "Cross Claim", dated September 24, 1979.

14. The National Democratic Party denies that the State Party is affiliated with the National Party for all purposes. The State Party has specific rights and obligations under the Charter and the By-laws of the Democratic Party of the United States.

15. The National Democratic Party denies the allegations in paragraph 15; however, the State Party must comply with the

terms of the Delegate Selection Rules to have its delegates seated at the 1980 National Democratic Convention and entitled to vote in the selection of the Party's Presidential and Vice Presidential nominees.

16. The National Democratic Party admits that the State Party is a voluntary unincorporated association subject to the laws of the State of Wisconsin; as to the other allegations in paragraph 16, the Open Primary statute speaks for itself.

17. The allegations in paragraph 17 need not be answered, because the statute speaks for itself.

18. The National Democratic Party denies the allegations in paragraph 18, but states that under the Delegate Selection Rules, participation in the delegate selection process in binding primaries, conventions or caucuses must be restricted to Democratic voters only who publicly declare their party preference and have that preference publicly recorded. Furthermore, the Rules require that delegates to the 1980 Democratic National Convention be chosen so as to reflect fairly the division of preferences by those who participate in a Presidential nominating process.

19. The allegations in paragraph 19 are argumentative and need not be answered.

20. The allegations in paragraph 20 are argumentative and need not be answered.

AFFIRMATIVE DEFENSE

The declaratory and injunctive relief that the State Party seeks against the National Democratic Party may not be granted, because it would violate the First and Fourteenth Amendments of the United States Constitution.

Dated this 10th day of October, 1979.

Respectfully submitted,

RONALD D. EASTMAN
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State of Wisconsin

In Supreme Court

STATE OF WISCONSIN ex rel.
BRONSON C. LA FOLLETTE,
Petitioner,

v.

Case No.
79-1328-OA

DEMOCRATIC PARTY, etc., et al.,
Respondents.

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties to this stipulation by their undersigned counsel, as follows:

A. The Parties.

1. Petitioner Bronson C. La Follette is the Attorney General of Wisconsin. He brings this action on behalf of the State of Wisconsin, pursuant to the authority of its Governor and on behalf of the citizens of the State of Wisconsin.

2. Respondent Democratic Party of the United States of America (hereafter "National Party") is a voluntary unincorporated association and a national political party whose purposes include: (a) nominating and assisting in the election of Democratic candidates for the offices of President and Vice President of the United States; (b) adopting and promoting statements of policy; (c) assisting state and local Democratic Party organizations in the election of their candidates and the education of their voters; (d) establishing standards and rules of procedure to afford all members of the Democratic Party full, timely, and equal opportunities to participate in decisions

concerning the selection of candidates, the formulation of policy, and the conduct of other party affairs, without prejudice on the basis of sex, race, age (if of voting age), religion, economic status, or ethnic origin, and, further, to promote fair campaign practices and the fair adjudication of disputes; and (e) working with Democratic public officials at all levels to achieve the objectives of the National Party.

3. Respondent Democratic National Committee (hereafter "DNC") has general responsibility for the affairs of the National Party between National Conventions, subject to the provisions of the Party's Charter and resolutions or other actions of the National Convention. Its responsibilities include issuing the Call to the National Convention, which establishes the delegate selection rules for the National Convention.

4. Respondent Democratic Party of Wisconsin (hereinafter "State Party") is a Wisconsin voluntary, unincorporated association organized as a political party to promote and preserve liberal, democratic government. To achieve these goals, the State Party promotes and supports candidates who are committed to the principles and objectives of the State and National Parties; conducts caucusses, meetings and a state convention; formulates policy; and promotes the full participation in its affairs without prejudice on the basis of sex, race, age, religion, economic status, or ethnic origin. The State Party is associated with the National Party and elects the Wisconsin members of the DNC.

B. The National Party's Delegate Selection Rules.

5. Article Two, Section 4 of the Charter of the Democratic Party of the United States ("Charter"), adopted in December, 1974, provides that:

> The National Convention shall be composed of delegates who are chosen through processes which (i) assure all Democratic voters full, timely and equal opportunity to participate and include affirma-

tive action programs toward that end, (ii) assure that delegations fairly reflect the division of preferences expressed by those who participate in the Presidential nominating process, (iii) exclude the use of the unit rule at any level, (iv) do not deny participation for failure to pay a cost, fee or poll tax, (v) restrict participation to Democrats only, and (vi) begin within the calendar year of the Convention.

6. The DNC adopted the Delegate Selection Rules for the 1980 Convention ("Rules") on June 9, 1978.

7. Rule 2 provides:

PARTICIPATION

A. Participation in the delegate selection process in primaries or caucuses shall be restricted to Democratic voters only who publicly declare their party preference and have that preference publicly recorded. Documentary evidence of a process which complies with this rule shall accompany all state Delegate Selection Plans upon their submission to the National Party. Such rules, when approved by the Compliance Review Commission and implemented shall constitute adequate provisions within the meaning of Section 9 of the 1972 Democratic National Convention mandate.

B. A Rule 20 exemption shall not be granted from Rule 2A requirements.

C. A State Party which is precluded by state statute from complying with this rule, shall adopt and implement an alternative party-run delegate selection system which complies with this rule.

D. State Parties shall take all feasible steps to encourage non-affiliated and new voters to register or enroll as Democrats and to provide simple, easy procedures through which they may do so.

E. No person shall be excluded from any stage of the delegate selection process for failure to pay a cost or fee.

8. Rule 12 provides in part:

FAIR REFLECTION OF PRESIDENTIAL PREFERENCES

A. The Call for the 1980 Democratic National Convention shall include provisions that assure that the delegates to the 1980 Democratic National Convention be chosen in a manner which fairly reflects the division of preferences by those who participate in the presidential nominating process in each state, territory and the District of Columbia.

B. At all stages of the delegate selection process, delegates shall be allocated in a fashion that fairly reflects the expressed presidential preference or uncommitted status of the primary voters or if there is no binding primary, the convention and caucus participants, except that preferences securing less than the applicable percentage of votes cast for the delegates to the National Convention shall not be awarded any delegates. . . . The CRC shall adopt regulations to prevent winner-take-all outcomes at the Congressional District or other smaller delegate selection unit. The CRC shall adopt regulations to govern the allocation of delegates in instances where no candidate reaches the applicable percentage.

C. At the level at which the National Convention delegates are selected, delegate selection systems which permit a plurality of votes to elect all of the delegates from that level shall not be used. Under no circumstances shall the use of single member delegate districts be permitted. State Democratic Parties shall ensure that District lines are not gerrymandered in order to discriminate against blacks or any other racial or ethnic minority. For purposes of these rules, plurality is defined as the most votes received by a candidate, whether or not that vote was the majority of the votes cast.

D. For the purpose of fairly reflecting the division of preferences, the nonbinding advisory presidential preference portion of primaries shall not be considered a step in the delegate selection process.

9. Rule 20 provides:

STATE LEGISLATIVE CHANGES

A. Wherever any part of any section contained in these rules conflicts with existing state laws, the State Party shall take provable positive steps to achieve legislative changes to bring the state law into compliance with the provisions of these rules.

B. Provable positive steps shall be taken in a timely fashion and shall include the drafting of corrective legislation; public endorsement by the State Party of such legislation; efforts to educate the public on the need for such legislation; active support for the legislation by the State Party lobbying state legislators, other public officials, Party officials and Party members; and encouraging consideration of the legislation by the appropriate legislative committees and bodies.

C. A State Party may be required to adopt and implement an alternative Party-run delegate selection system which does not conflict with these rules, regardless of any provable positive steps the state may have taken.

10. Pursuant to its authority under Article Three, Section 1 of the Charter, the DNC adopted the Final Call for the 1980 Democratic Convention ("the Call") on May 25, 1979, incorporating the Rules. The Call formally establishes the date of the Convention, the qualifications for delegates, the Convention's procedures, and other rules essential to the conduct of the Convention.

11. The Call provides that "delegates and alternates to the 1980 Democratic National Convention shall be selected in accordance with the Delegate Selection Rules." Compliance with said Rules is a condition the State Party must meet in order to participate in any respect at the national convention.

12. The Rules authorize the Compliance Review Commission ("CRC") to "review Delegate Selection Plans submitted by State Parties and approve or recommend changes in such plans."

13. On May 11, 1979, the Chairman of the State Party transmitted the Wisconsin Delegate Selection Plan for 1980 to the CRC.

14. On July 12, 1979, the CRC reviewed and considered the Wisconsin Delegate Selection Plan. The CRC determined that the Plan did not comply with the Rules because participation in the April 1 Wisconsin primary is not restricted to Democratic voters only who publicly declare their party preference and have that preference publicly recorded, and because the State Party had not adopted and implemented an alternative Party-run delegate selection system.

15. On July 19, 1979, the CRC notified the Chairman of the State Party that it found the Plan did not meet the requirements of the Rules and the Call.

C. ***Past methods of delegate selection and changes required by DNC rules.***

16. In 1976 the Wisconsin Open Primary was utilized for the purpose of apportioning the number of delegates to the various candidates for President of the United States according to the percentage of the vote in each congressional district and the state at-large. Those delegates were bound to vote the preferences expressed in the primary. Wisconsin voters did not elect delegates and alternates to the National convention at the Wisconsin Open Primary. The selection of the actual delegates

was conducted at the caucusses attended by persons who publicly declared themselves to be Democrats and in complete compliance with the DNC rules and objectives with respect to the sex, race, age, religion, economic status, and ethnic origin of the delegates and alternates. Thus, in 1976, of the Wisconsin delegates and alternates to the Democratic National Convention, 58 delegates and 36 alternates were chosen at congressional district caucusses conducted by the State Party. Ten delegates and eight alternates were chosen as at-large delegates and alternates by the delegates and alternates chosen at the congressional district caucusses. Under the applicable Rules of the National Party in 1976, it was possible to obtain an exemption from Rule 2 of the DNC Rules which require that "participation in the delegate selection process be restricted to Democratic voters only" who publicly declare their party preference and have that preference publicly recorded. The State Party obtained such an exemption in 1976.

17. On June 9, 1978, the DNC adopted Delegate Selection Rules including Rule 2B, which is quoted in Paragraph 7 of this stipulation. Thus, the 1980 Rules preclude obtaining an exemption from Rule 2A. The effect of this change is that a Wisconsin delegation which is apportioned to candidates on the basis of the results of the Wisconsin Open Primary will not be seated. The only Wisconsin delegation which will be seated is one which complies with all of the National Party's Rules including Rule 2A.

18. The essential difference between the process under the Open Primary and the DNC's Delegate Selection Rules concerns who participates in the determination of what proportion of the delegates are allotted to the respective candidates. Under the Open Primary Law, nominee preference and apportionment is measured by the results of the Open Primary in the spring. Voters can vote in the primary without publicly declaring their party preference. Under the DNC rules, the State Party may determine presidential preference through a primary, at a Convention or in caucusses. The DNC does not

mandate which of these systems must be used. However, participation in the process of determining preference as to the Democratic nominee must be limited to Democratic voters only who publicly declare their party preference and have that preference publicly recorded. If the State does not change its law so that only voters who publicly declare Democratic party preference and have that preference publicly recorded may participate in the binding Democratic primary, then the State Party must adopt and implement an alternative Party-run system which complies with the Rules.

19. Under *both* the Open Primary Law and the alternative caucus plan pursuant to the rules of the DNC: (1) the process for selecting the delegates is under the control and direction of the State Party; (2) only Democrats and those who subscribe to the general progressive principles of the State Party may participate in selecting delegates; and (3) a committed delegation results, *i.e.,* delegates to the National Convention are bound to support a particular candidate.

The parties stipulate to the authenticity of exhibits one through fourteen attached hereto.

Charles D. Hoornstra
Assistant Attorney General
On behalf of petitioner

Robert H. Friebert
Friebert & Finerty
On behalf of Democratic Party of Wisconsin

Ronald D. Eastman
Cadwalader, Wickersham & Taft
On behalf of Democratic Party of the United States of America and Democratic National Committee

MANDATE FOR REFORM

A REPORT OF THE

COMMISSION ON PARTY STRUCTURE

AND

DELEGATE SELECTION

TO THE

DEMOCRATIC NATIONAL COMMITTEE

[38] THE OFFICIAL GUIDELINES OF THE COMMISSION

[39] PART II—THE GUIDELINES

[47] C-3 Open and closed processes

The Commission believes that Party membership, and hence opportunity to participate in the delegate selection process, must be open to all persons who wish to be Democrats and who are not already members of another political party; conversely, a full opportunity for all Democrats to participate is diluted if members of other political parties are allowed to participate in the selection of delegates to the Democratic National Convention.

DEMOCRATS ALL

A REPORT OF THE COMMISSION ON DELEGATE SELECTION AND PARTY STRUCTURE

[1] TO: Democratic National Committee Members & Members of the Democratic Party

The Democratic Party has been, and is today, the party of the *People.* It is the Party that has traditionally welcomed the support of the newly enfranchised, the upwardly striving and the progressive voters — women, immigrants, minority groups, old and young, workers and scholars. It is the Party of the working people in the United States — blue collar, white collar and no collar.

And it is the Party that has continually reformed itself it is an open Party which strives to make democracy, and our Republic, a vigorous living reality.

The National Democratic Convention, called every four years to elect the Party's standard bearer and set forth its platform, is a great source of institutional strength. Its purpose, once a nominee and platform are selected, is to weld a diversity of state organizations, special interest groups and rank and file Democrats into a broad coalition which when it puts forth its best effort elects the president of the United States.

Because of our commitment to basic democracy and an open Party we have spent this past year searching for the best way to insure the opportunity for every Democrat to participate in the delegate selection and nominating process.

And so we present to you the rules of the 1973 Delegate Selection Commission of the Democratic National Committee. We have written these rules with the reminders: are they fair;

are they clear; and can they be implemented? We have travelled the country and asked party leaders, elected officials and rank and file Democrats for their advice and suggestions. We have listened to everyone who had anything to suggest about the rules.

The Commission faced a difficult task in developing rules that would be oriented to party unity and coalition building among its pluralistic constituencies. I think the first phase of the Commission's work has been tremendously successful, but another major task lies ahead. Democrats across the country must understand the new rules and why it is important to participate in the delegate selection process.

[2] The new rules essentially guarantee *fairness, ease of participation, information* and *representation* in these specific ways:

First, the rules assure that information explaining how, when and where to participate will be made available:

—party rules must be adopted and distributed which clearly explain the delegate selection process by January 1 or 90 days ahead of time.

—times, dates, and places of party meetings must be effectively publicized.

—the preferences of candidates for delegate must be publicized so that Democrats can vote on an informed basis.

Secondly, ease of participation is assured:

—party meetings must be held in convenient public places and begin and end at reasonable hours.

—no costs or fees may be required to participate.

—if you attend a party meeting and must leave before the meeting is over and no alternate for you is present, you may leave a proxy vote with another participant.

—state parties must take affirmative action to reach out to all Democrats to involve them in the delegate selection process and all Party affairs, with particular attention to minorities, native Americans, women & other traditionally under-represented groups.

Third, fairness must be guaranteed:

—participation must be restricted to Democrats.

—business may not be conducted without 40% of the members of delegates present.

—the unit rules may not be imposed on any delegates.

—National Convention delegates must be distributed within the state according to 1 of 4 formulas based on different measures of Democratic strength.

—at least 75% of the National Convention delegates must be elected from units no larger than a Congressional District, thereby bringing the process closer to the grass roots.

—presidential candidates have the right to approve delegate-candidates running on behalf of their candidacy.

—no delegate may be bound to vote against his or her expressed preference.

—[3] no slate of delegates may receive preferential treatment or be designated as the "official" slate.

—discrimination on any basis is prohibited.

—a Compliance Review Commission will approve state Affirmative Action and Delegate Selection plans to assure they meet the requirements of the rules and are implemented.

Fourth, representation and *responsiveness* was assured:

—all steps in the delegate selection process, except the election of state committee members, must take place in 1976.

—elected delegates must fairly reflect the expressed preferences of the voters in a binding primary or the participants in a caucus or convention, if the preferences are supported by at least 10% of the voters.

—the publicly elected delegates or the state committee in primary states may select 25% of the delegation at large to assure representation of public and party officials, and previously under-represented Democratic constituencies.

—alternates to replace delegates must be of the same presidential preference and from the same political subdivision, if possible, of the delegate being replaced.

We are also submitting the documents which have formed the basis for our decisions and aided us in our deliberations. These constitute the legislative history of the Commission's work.

The 74 members of the Commission are a microcosim of all the elements of the Democratic Party — and we have welded together a true Democratic coalition. We have worked together for almost a year and we have arrived at a report, unanimously accepted.

In accord with our mandate from the 1972 Democratic National Convention we hereby present our report to the Democratic National Committee.

On behalf of the Commission I would like to extend my personal thanks for your advice, support and cooperation.

Sincerely,

Barbara Mikulski
Chairwoman
Commission on Delegate Selection
and Party Structure

* * * *

[8] WHERE DID WE COME FROM?

* * * *

[9] The McGovern-Fraser Commission took important steps to eliminate these inadequacies in the delegate selection process. Perhaps the two most fundamental underpinnings of the McGovern-Fraser Rules, concepts which the National Democratic Party continues to embrace, were 1) that all Democrats should be treated as equals and none should be granted special voting rights or decision making privileges, and 2) that a policy of non-discrimination alone, without an effective outreach effort, would be insufficient to overcome the historical, cultural and psychological barriers to full participation that face groups long closed out of the decision-making process of American politics because of their race, sex, or other irrational criteria. This "democratization" of the delegate selection process was reinforced by 18 guidelines governing permissible costs and fees, the existence of readily available party rules, the accessibility of voter registration machinery, the abolition of the unit rule, fair intrastate apportionment of delegates, the prohibition of unfair advantages sometimes accorded to delegate slates, adequate notice of delegate selection processes, and timeliness of the selection of National Convention delegates.

The 1972 Convention also discovered that the McGovern-Fraser Rules did not address the serious questions raised by "unfaithful" delegates, proportional representation, and cross-over voting — issues later dealt with by the 1972 Conventions' Rules Committee and referred to this Commission for implementation.

* * * *

[15] REPORT OF THE COMMISSION ON DELEGATE SELECTION AND PARTY STRUCTURE

ADOPTED UNANIMOUSLY

October 27, 1973

2. DEMOCRATIC PARTICIPATION

A. State Parties must take all feasible steps to restrict participation in the delegate selection process to Democratic voters only. Such steps shall be included in proposed party rules submitted to the Compliance Review Commission of the National Democratic Party. Such rules, when approved by the Compliance Review Commission and implemented shall constitute adequate provisions within the meaning of Section 9 of the 1972 Democratic National Convention mandate.

B. State Parties shall take all feasible steps to encourage non-affiliated and new voters to register or enroll as Democrats and to provide simple, easy procedures through which they may do so.

DELEGATE SELECTION

RULES FOR THE

1976

DEMOCRATIC NATIONAL

CONVENTION

[1] 2. DEMOCRATIC PARTICIPATION

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B. State Parties shall take all feasible steps to encourage non-affiliated and new voters to register or enroll as Democrats and to provide simple, easy procedures through which they may do so.

OPENNESS, PARTICIPATION AND PARTY BUILDING: REFORMS FOR A STRONGER DEMOCRATIC PARTY

PART I

DISCUSSION OF THE PRESIDENTIAL NOMINATION PROCESS AND RECOMMENDATIONS OF THE COMMISSION ON PRESIDENTIAL NOMINATION AND PARTY STRUCTURE

[1] Section 1. History of Presidential Nominations

The United States is one of the very few modern democratic governments that now uses or has ever used the direct primary to make nominations for elective office. Use of the direct primary makes our nomination system unique among the nominating systems of other parties for implicit in its use is a very sweeping definition of party membership. Most of the world's political parties have specific criteria for party membership and nomination processes are limited to leaders of the parties. American political parties tend to define party membership much more broadly. To participate in the nomination process, either as a candidate or as a voter, a person need never have worked for a party, paid dues to a party, or in some states, even been publicly identified with a party.

Presidential preference primaries are important for reasons beyond their uniqueness among other nominating systems. Between 1905 and 1976 the number of primaries increased so much that in 1976 approximately three quarters of the Democratic National Convention delegates were selected in primary states.

The costs of holding these primaries are substantial. Even before January 1976 presidential candidates spent more than

$16.5 million. By the end of the process $72 million was spent, $24.2 million of which came from federal matching funds. Election officials spent at least an additional $22.6 million to administer primaries in their states.[1]

Because of the proliferation of primaries and their rising costs, the Commission on Presidential Nomination and Party Structure was mandated to investigate their role in the presidential nomination system of the Democratic Party.

Growth of Presidential Primaries

Presidential primaries were not always the center piece of presidential nomination in the United States. In the early years of the Republic, Congressmen chose the presidential nominees of their party. Use of the congressional caucus to make party nominations continued to the early 1820's when a number of reform Republicans persuaded their Congressmen to denounce "King Caucus" and to boycott the caucus called for 1824. The reformers succeeded and the caucus nominee of that year was soundly defeated.

Presidential nomination by congressional caucus was eventually replaced by the national nominating convention. The first national conventions were held by the Antimason Party and by the National Republican Party in 1831. In 1832, the Democratic Republicans held a nominating convention in order to drop John C. Calhoun (who had many friends [2] in Congress) from the Andrew Jackson ticket. From 1832 to the present the nominating convention has persisted, despite the rise and fall of political parties as the mechanism for presidential nomination.

Nevertheless, within the structure of the nominating convention there has been a series of important reforms so that the

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[1] See Kimball W. Brace, *The 1976 Presidential Primaries: An Analysis of How Many People Participated and How Much Money was Spent.* (Washington, D.C., Commission on Presidential Nomination and Party Structure, May 1977).

nominating conventions of today look very different from the nominating conventions of the 1830's or even the 1940's.

Prior to 1905 there were no mandatory presidential primaries. Delegates were chosen in gatherings of local and state party leaders. Between 1905 and 1925 states began adopting presidential primaries, a Progressive Era innovation developed to circumvent party organizations. After 1925 primaries declined somewhat in importance in the nomination process as it became clear that, for a variety of reasons to be discussed later, they had little effect on convention outcomes. In 1968 the number of primaries increased once again as did their importance in the nominating process.

There are two explanations for periodic public pressure to increase the use of presidential primaries. The first is political; people have wanted to institute primaries after periods of intense intra-party conflict. The second is philosophical; people have justified the institution of primaries by arguing that parties as organizations are undemocratic and that primaries are more representative of the popular will.

People have wanted to institute primaries when there have been factional divisions within the party leaving one or more factions displeased with the outcome of the convention. It is no coincidence that the number of proposals in Congress for some sort of national primary system increased following extremely divisive conventions. For instance, in 1912 Progressive Republicans led by Teddy Roosevelt hotly contested the renomination of William Howard Taft. Roosevelt won 9 out of 12 primaries, including some major states like Illinois, Pennsylvania, Ohio and California. Taft won one primary by a narrow margin. Nevertheless, Taft won renomination at the Republican Convention, to the consternation of many Republicans who then bolted for the Progressive Party and contributed to the ensuing loss to Woodrow Wilson.

During and after the turbulent Republican primary of 1912, Congress considered 17 proposals for some sort of

federally regulated primary. While no action was taken on the federal level, on the state level more and more states adopted the direct primary along with other progressive reforms that were supposed to end "boss" rule and make the candidates responsive to the people alone. By 1916, 26 states had some form of presidential primary. Then, as now, people predicted that the national convention would [3] become, like the electoral college, a mere mechanism for recording decisions arrived at by the electorate.

However, in the period following the Progressive Era, interest in the Progressive's reforms faded away. Some states repealed their presidential primary laws. Repeal of presidential primaries occurred because party leaders felt that they reduced their power, because the costs of holding them were high, and because they were ultimately not decisive in the nomination of the presidential candidate. Voter participation in primaries was low, and leading candidates frequently did not enter the primaries, preferring instead to bargain with the favorite sons who ran in the primary and then controlled their delegates.[2]

A description of the presidential nomination process during the period prior to 1968 is summarized by the famous scholar of American politics, V.O. Key. He describes the then prevalent convention system of delegate selection as follows:

> Ordinarily the convention procedure does not permit extensive participation by the rank and file of the party in the choice of delegates. Though the convention may not be bossed, selection of delegates becomes a matter handled almost exclusively by the party professionals. Yet, on the whole the convention processes produce delegations representative of the general tenor of sentiment of the party in the state. The principal difficulties with selection by

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[2] See James W. Davis, *Springboard to the White House: Presidential Primaries, How They are Fought and Won.* (New York, Thomas Y. Crowell, 1967).

> convention seem to occur when the convention members really have no constituencies and are, perhaps for that reason, unable to produce a decision acceptable to all concerned.[3]

By 1952 only 16 states had presidential primaries. Senator Kefauver won 12 of those primaries but the Democratic nomination went to Adlai Stevenson in a convention widely considered controlled by Truman. Again, intense intra-party rivalry occurred. Charges of "bossism" were heard from all sides. This resulted in the introduction of 36 presidential primary proposals in the subsequent Congress.

In the years between 1967 and 1972 the Democratic Party was, once again, seriously divided. Dissent over the war in Vietnam and over social issues fragmented the Party. The delegate selection processes in effect in 1968 failed to register the full extent of dissent within the Party. One response to the inability of the Party to deal with the divisions within was a resurgence of interest in presidential primaries. In the two Congresses surrounding the 1968 elections, 48 presidential primary proposals were introduced. In a parallel development within the [4] states, six more states enacted presidential primary laws between 1968 and 1972, bringing the total from 17 to 23.

Eight more states adopted primaries before 1976, bringing the total to 31 and making the 1976 nomination process more dominated by primaries than any other primary season in our history. In 1976 about three quarters of the Democratic Party's convention delegates were apportioned among primary states.

Thus, the first way to understand the evolution of the presidential primary as the most important component of the nomination system is to view it as a response to severe strains within the Party which no one managed to compromise away

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[3] V.O. Key, Jr., *Politics, Parties and Pressure Groups,* (New York, Thomas Y. Crowell Co., 1964), p. 408.

during the season prior to the convention. As a result of these conflicts many people blamed the nomination process and sought to change the structure.

The second explanation for the increasing use of the direct primary is philosophical. Austin Ranney has identified a strong anti-party strain in American political thought and practice. Americans, he says, have a tendency to:

> . . . deal uneasily with the necessities of partisan political organization because of their widespread belief that political parties are, at best, unavoidable evils whose propensities for divisiveness, oligarchy, and corruption must be closely watched and sternly controlled.[4]

The anti-party line of thought appeared in the infancy of the American Republic. Men like Alexander Hamilton, who saw parties or factions as the source of corruption of the English political system, urged as an advantage of a "firm union" the opportunity to supress factionalism.[5]

In the Progressive Era reformers sought to end bossism and corruption in the political parties, not by building new parties, but by destroying party organizations that controlled the nomination process. Robert LaFollette, the father of the modern presidential primary, justified the primary in the following way:

> No longer will there stand between the voter and the official a political machine with a complicated system of caucuses and conventions, by the manipulation of which it thwarts the will of the voter and rules of official conduct. . . .[6]

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[4] Austin Ranney, *Curing the Mischiefs of Faction, Party Reform in America* (Berkeley, University of California Press, 1975), p. 22.

[5] See Alexander Hamilton, Federalist Paper #9.

[6] Quoted in Ranney, op. cit., p. 124.

The reformers understood that removing the nominating power from a party organization rendered the organization almost without purpose.

Another Progressive Era reformer, George W. Norris, assessed the consequences of a direct primary as follows:

> [5] It does lessen allegiance to party and increase individual independence, both as to the public official and as to the private citizen. It takes away the power of the party leader or boss and places the responsibility for control upon the individual. It lessens party spirit and decreases partisanship. These are some of the reasons why the primary should be retained and extended.[7]

The Reform Movement, 1964-1976

In the late sixties and early seventies reformers in the Democratic Party focused on making the Party more open. While some expressed viewpoints reminiscent of the anti-party rhetoric of the Progressive Era, other reformers of the late sixties envisioned party-building which sought maximum participation by all rank and file Democrats.[8]

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[7] Quoted in Ranney, ibid., p. 125.

[8] An example of some anti-party rhetoric from the 1960's is provided below:

> Mixner: And so they found a new game. All right, so we won't put our token opposition on our delegation if we can't control them. We'll make a slate, we have a 51%, we'll take all, we'll take 100% to the next step. Mr. Chairman, every time you let these party people have any role in the process, they'll find some way to cheat you. If it's not Winner-Take-All, it's slating, or its manipulation of some other rule. And boy can they deal at the convention, if you let them get to the convention, with the power they have over winner-take-all. If there's ever backroom deals, they're going to be made after the second and third ballot,

(*footnote continues*)

The 1968 Democratic National Convention was perceived as unrepresentative of the Democratic Party's rank and file membership on two dimensions: demographics and candidate preference. Blacks, whose demands for representation began with the Mississippi challenge at the 1964 Convention, were represented in numbers far below their presence in the electorate. Additionally, their numbers did not reflect their political importance as heavily Democratic voters. Women were just beginning to organize for more representation in the Party and they joined blacks in demanding greater representation in Party affairs.

The anti-war activists who supported Gene McCarthy for the nomination also complained that, due to the delegate selection rules in effect, the presidential preferences of large numbers of Democrats could not be translated into delegate strength.

The problems the Party faced at the 1968 Convention resulted in strong support for party reform of delegate selection.

(*footnote continued*)

> by these party people. It'll be, 'I'll deliver you my delegation for this and this and this'. It's happened and it will continue to happen. You've got to get these party people out of the process, you've got to, at least you've got to have a system which is so open that they get overwhelmed. I think most reformers now agree that you cannot allow these regular party people to have any control over anything, and still hope that you will have democracy in the parties.
>
> Mitchell: Now David, I think you're being a bit harsh here.
>
> Mixner: There may be a few decent people, like you, George, but let me just say it again. Either you get the party people out of the process of picking delegates, or else you won't have any real democracy. Or else you'll just have more explosions, like Chicago.
>
> McGovern-Fraser Commission transcripts November 19-20, 1969.*

* There is a minority report to this footnote.

Under the chairmanship of George McGovern and later Donald Fraser, a Commission was established to review delegate selection rules for 1968 and to establish guidelines for the 1972 Convention. They concluded that at the 1968 Convention:

> . . . meaningful participation of Democratic voters in the choice of their presidential nominee was often difficult or costly, sometimes completely illusory, and, in not a few instances, impossible. . . .[9]

The reforms of the Commission sought to insure that all interested persons could compete equally for delegate slots at the grassroots level. Party leaders were to have [6] no more influence on delegate selection than any other Democrat.

A set of guidelines were adopted to insure that, in states that had conventions, rank and file Democrats could not be excluded from the process. These guidelines called for publication and distribution of rules governing the caucuses; required states to differentiate delegate selection from other party business; required state parties to select delegates in a timely manner; and encouraged notification of delegates' presidential preferences. This changed the old method of delegate selection considerably.

Another set of reforms encouraged accurate representation of the Democratic electorate and of the voters' candidate preferences. One guideline advocated representation of minorities, women and youth ". . . in reasonable relationship to their presence in the population of the state." A footnote stated ". . . this is not to be accomplished by the mandatory imposition of quotas", nevertheless some people viewed the 1972 system as not distinct from a quota system.[10]

The Charter Convention of 1974 and the Mikulski Commission, which wrote the delegate selection rules for 1976,

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[9] Commission on Party Structure and Delegate Selection, *Mandate for Reform.* (Washington, D.C., Democratic National Committee, 1970), p. 10.

[10] Ibid., footnote #7.

subsequently rejected the use of quotas to achieve minority representation. However, the Mikulski Commission mandated the states to create and implement extensive Affirmative Action Plans to encourage minority and women's participation.

A related McGovern-Fraser guideline encouraged states to adopt procedures that allowed for "... fair representation of minority views on presidential candidates." California's winner-take-all primary was challenged at the 1972 Convention on the grounds that it violated this guideline. Although the 1972 Convention allowed the California delegation to be seated, it mandated the next rules commission to ban winner-take-all systems at all levels at the next convention.

The next rules commission, the Mikulski Commission, wrote Rule 11. This rule required fair reflection of presidential preferences at the 1976 Convention. There was a provision, however, which allowed states which elected their delegates in direct delegate selection primaries to keep their systems. Since this much criticized method of delegate selection sometimes produced the winner-take-all outcomes at the Congressional District or Legislative District level, it became known as the "loophole" in the fair reflection rule.

The 1976 Rules Committee responded to pressure to close the "loophole" by adopting Section 9 of its report to the Convention. It instructed the current Commission to write rules that eliminate systems which permit "... a plurality of votes to elect all of the delegates from any [7] given district."

The Debate on Presidential Nominations

Much of the recent and not so recent debate over presidential nominations is a debate over the following question: Who should participate in selecting the presidential nominee of the Party?

Some define the Party as those activists and elected party officials that are involved with Party affairs year after year.

They argue that these people should be well represented in the selection of a presidential nominee since it is their business to know and represent the electorate and to win elections.

Reformers tend to define the Party as those voters who have enough of a psychological commitment to the Party to call themselves Democrats. They feel that it is most important to guarantee maximum grass roots involvement in the presidential nomination process.

Since so much attention has been focused on the question: Who should participate in presidential nomination?, it is helpful to look at three key groups of relevant actors in the nomination process—primary voters, convention delegates, and state party organizations. The following three sections address themselves to each group's participation in presidential nomination.

[10] Section 2. THE PRIMARY AND CAUCUS PARTICIPANTS

Introduction

This Section will examine primary and caucus participants and compare those two groups, as best as possible, to the Democratic general election electorate. As will be demonstrated, neither system is fully representative of the Democratic electorate nor is one system more representative than the other.

Primary Participants

With the primaries responsible for the determination of presidential preference of nearly 75% of the convention delegates, there is little doubt that they are now the most important components of the nomination process. The widespread assumption has been that this is as it should be since the primaries are the most representative element of our nominating system. This assumption warrants examination; for while the presidential primary involves the greatest number of

people in the selection of a presidential nominee, the primary electorate may be a biased reflection of rank and file Democrats.

This bias can be created because turnout in primaries is consistently lower than turnout in the general election. Although primary turnout has been increasing steadily since 1968, in 1976 primary turnout was still lower than turnout in the general election; 28.9% of the voting age population turned out in primaries and 53.3% of the voting age population turned out in the general election in competitive primary states.[1]

One of the most consistent findings in research on voter turnout is that people with higher socio-economic status turn out to vote much more regularly than other groups in the population. They are more likely to read newspapers, watch TV news and follow political events, and they are less likely to be deterred from voting by restrictive registration laws.[2]

For those who do not have the time and/or skills to follow politics, the party label has been the most convenient tool allowing people who do not know whom to vote for to make a choice.[3]

In primaries there is, obviously, no party label to help voters vote who have not paid much attention to politics. Thus,

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[1] Austin Ranney, *Participation in American Presidential Nominations,* 1976 (Washington, D.C. American Enterprise Institute for Public Policy Research, 1977), p. 25.

[2] See Angus Campbell et. al., *The American Voter,* (New York, John Wiley and Sons, 1962). Also see Steven J. Rosenstone and Raymond E. Wolfinger, "The Effects of Registration Laws on Voter Turnout". Paper presented at the 1976 Annual Meeting of the American Political Science Association. (Chicago, Illinois, September 1976).

[3] See Angus Campbell, et. al. Ibid. Also, Anthony Downs, *An Economic Theory of Democracy,* (New York, Harper & Row, 1962).

it comes as no surprise that turnout in all kinds of primaries is consistently lower than turnout in general elections.[4]

Since voter turnout is so highly related to social class variables it follows that the primary electorate will be drawn from the more highly educated and middle class [11] portions of the population.

James Lengle studied the 1968 and 1972 California primary and electorates.[5] Using Field's 1968 and 1972 post-presidential primary surveys, he compared primary voters with the entire Democratic Party membership; defined as all Democratic Party identifiers. Looking at education, income, social class, occupation and race for both years he found that on each measure the primary electorate was unrepresentative of the Democratic rank and file. For example, people with college degrees and advanced degrees comprised a much larger share of the primary electorate than of the general electorate. Likewise, people in highly paid white collar jobs comprised a larger share of the primary, rather than general, electorate. Finally, minorities, especially Asians and Hispanics, were clearly underrepresented in primary electorates in 1968 and 1972. Blacks were seriously underrepresented in 1972.

For 1976 we took a sample of registered, likely, general election voters from Cambridge Survey Research polls and compared that group to a New York Times/CBS sample of

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[4] See V.O. Key, Jr. *American State Politics: An Introduction* (New York, Alfred A. Knopf, 1956) on gubernatorial and congressional primaries; Arthur C. Wolfe, *The Direct Primary in American Politics,* (unpublished Ph.D thesis in political science, University of Michigan, 1966) on gubernatorial and congressional primaries; Julian F. S. Foster, *Congressional Primaries,* (unpublished Ph.D. thesis, University of California, Los Angeles, 1963) on congressional primaries; Austin Ranney, "Parties in State Politics" in Herbert Jacob and Kenneth Vines, (eds.) *Politics in the American States: A Comparative Analysis,* 2nd ed. (Boston, Little Brown, 1971) on gubernatorial and Senate primaries.

[5] James P. Lengle, "Demographic Representation in California's 1972 and 1968 Democratic Presidential Primaries." Paper prepared for delivery at Annual Meeting of the American Political Science Association, (Chicago, Illinois, September, 1976).

primary voters.[6] Since the sample of general election voters consists of actual registered Democrats who have been voting recently, it is already a special subsection of all Democratic identifiers. Nevertheless, the differences between primary voters and general election voters, while not as great as in the 1972 study, are still large. For instance, in all the states examined for 1976 there were far fewer Democratic primary voters with less than a high school education than there were general election Democratic voters.

TABLE 1

Percentage of Voters in Democratic Primary Electorate and in Democratic General Election Electorate with Less Than a High School Education.

	Primary	General
California	11	27
Florida	13	30
Illinois	19	34
Indiana	21	40
Massachusetts	12	19
Michigan	20	30
New Hampshire	11	18
New Jersey	12	41
New York	15	31
Ohio	15	32
Oregon	19	18
Pennsylvania	17	32
Wisconsin	18	25

[6] Thanks to Patrick Caddell, Cambridge Survey Research and Professor Gary Orren, Harvard University, for making the data available to the Commission.

[12] At the other end of the education scale, college educated people were consistently overrepresented in the primary electorates.

TABLE 2

Percentage of Voters in the Democratic Primary Electorate and in the Democratic General Election Electorate with a College Degree or Beyond.

	Primary	General
California	34	17
Florida	28	17
Illinois	23	6
Indiana	13	6
Massachusetts	36	22
Michigan	20	10
New Hampshire	38	18
New Jersey	35	14
New York	32	19
Ohio	25	10
Oregon	23	20
Pennsylvania	23	15
Wisconsin	22	15

People earning $20,000 per year or more also tended to be overrepresented in the primary electorate.

TABLE 3

Percentage of Voters in the Democratic Primary Electorate and in the General Election Electorate Who Earn More Than $20,000 Per Year.

	Primary	General
California	35	23
Florida	26	16
Illinois	25	21
Indiana	17	11
Massachusetts	24	24
Michigan	16	17
New Hampshire	15	14
New Jersey	37	19
New York	32	16
Ohio	23	17
Oregon	15	23
Pennsylvania	20	9
Wisconsin	no data	no data

[13] Black people are under-represented in the primary electorate.

TABLE 4

Percentage of Black Voters in the Democratic Primary Electorate and in the Democratic General Election Electorate.

	Primary	General
California	12	15
Florida	8	14
Illinois	15	16
Indiana	10	11
Massachusetts	2	3
Michigan	11	22
New Hampshire	—	—
New Jersey	17	26
New York	15	20
Ohio	11	17
Oregon	no data	no data
Pennsylvania	8	15
Wisconsin	3	7

People over 65 years of age are underrepresented in the primary electorate.[7]

[7] Unfortunately it was impossible to show data on the participation of young people in each electorate since the categories in the two surveys could not be matched.

TABLE 5

Percentage of Voters Over 65 in the Democratic Primary Electorate and in the Democratic General Election Electorate.

	Primary	General
California	9	19
Florida	23	28
Illinois	8	17
Indiana	7	24
Massachusetts	10	18
Michigan	11	17
New Hampshire	6	13
New Jersey	9	16
New York	15	14
Ohio	7	19
Oregon	23	13
Pennsylvania	9	15
Wisconsin	13	19

[14] While the primary electorate has a demographic bias towards the middle and upper middle classes does it also have an ideological bias? This seems to depend on the nature of the election race and the state. For instance, in 1968 Austin Ranney found that, on the salient issue of the war in Vietnam, New Hampshire primary voters tended to be more hawkish than non-voters.[8] In 1972 in California, Lengle found that those Democrats who turned out to vote in primaries were much more liberal than Democrats who did not vote in the primaries.[9]

Limited evidence on 1976 suggests that while there may be a slight tendency for conservatives to be underrepresented in

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[8] See Austin Ranney, "Turnout and Representation in Presidential Primary Elections", *American Political Science Review,* March 1972, p. 29.

[9] Lengle, "Demographic Representation in California's 1972 and 1968 Democratic Presidential Primaries."

the Democratic primary electorate (due to the fact that the overrepresented, college educated tend to be more liberal), the two electorates may not be as distant as they were in 1972. For instance, the Wisconsin primary electorate had fewer people classifying themselves as conservatives but about the same number classifying themselves as liberals in the general electorate.[10]

A third dimension on which it is possible to compare Democratic primary voters with Democratic general election voters is candidate preference. Lengle found stronger support for Gene McCarthy among the educated (and overrepresented) segment of the Democratic Party and negligible support for McCarthy among Democrats who had a high school education or less. Likewise, in 1972 college educated Democrats preferred McGovern to Humphrey by a large margin, whereas among Democrats with a high school education or less Humphrey was preferred by a large margin.[11]

Professor Gary Orren has studied the 1976 primaries and concluded that while Udall drew support consistently from professional, college educated, upper income people, Carter drew support from all status categories. Carter support tended to be more varied than Udall support and depended on the state and the contest in that state.[12]

We can make two conclusions about the 1976 primary electorate. Demographically, the 1976 electorate is as unrepresentative of Democratic Party identifiers as previous

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[10] WISCONSIN

	Primary Electorate (New York Times)	General Electorate (Cambridge Survey Research)
Liberal	27%	23%
Moderate	44	36
Conservative	22	39

[11] Lengle, op. cit.

[12] See Gary Orren, Harvard University, unpublished paper, "The 1976 Presidential Primaries."

primary electorates. Furthermore, there are no easy ways to increase voter turnout in primaries so that the over-representation of the higher socio-economic groups is corrected. Austin Ranney demonstrated that restrictive registration laws do not explain low turnout in presidential primaries nearly as well as they do in general elections. Therefore, easing registration laws would not necessarily increase turnout in primaries.[13]

A second more tentative conclusion we can make is that in 1976 the overrepresented middle and upper middle classes did not produce an outcome significantly different from that which would have occurred with a more [15] representative primary electorate.

Caucus Participants

Data on caucus participants show that there are far fewer caucus participants than primary voters. In 1976, some 3.9% of the eligible persons participated in the caucus system; this was less than one-tenth the participation rate of the primaries. Like primary voters, they are drawn from the upper socio-economic strata. A study of the Minnesota caucuses in 1972 shows that more than twice the percentage of professionals were found in attendance at the caucuses as are found in the Democratic population.[14] The same study showed that caucus attenders are generally more liberal than other Democrats. This is not surprising due to the fact that research has shown repeatedly that politically active Democrats tend to be more liberal than rank and file Democrats and that politically active Republicans

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[13] Austin Ranney, "Participation in American Presidential Nominations, 1976". (Washington, D.C., American Enterprise Institute, 1977), p. 27.

[14] Thomas R. Marshall, "Delegate Selection in Nonprimary States; The Question of Representation". *National Civic Review*, September, 1976.

tend to be more conservative than rank and file Republicans.[15] Also as indicated earlier, primary participants in 1972 were more liberal than primary nonparticipants.

Finally, Minnesota caucus attenders were slightly less favorable towards Humphrey than non-participants, although these differences were not statistically significant.

In conclusion, rank and file participation in the nominating process has invariably been demographically unrepresentative of the Democratic rank and file. Whether nomination participants are unrepresentative on other dimensions probably varies from election to election.

[24] Section 4. STATE PARTIES AND THE PRESIDENTIAL PRIMARIES

. . . Whether or not primaries strengthen state parties depends on how one defines the party. To return to an earlier point, if one defines "the party" as those identifiers in the electorate, then primaries do involve many more people in the process. However, it is hard to know whether primaries strengthen the commitment of Democratic voters to the Democratic Party or to the Democratic candidates. As we have seen, some Democrats stay out of the primaries altogether. Also, some Democrats who are displeased with the outcome of the nomination process do not hesitate to vote for the Republican candidate for president. . . .

[29] Section 5. PROPOSALS FOR CHANGING THE NOMINATING SYSTEM

There are several directions that changes in the nominating system can take. We can move to a state by state caucus system, we can move to decrease the importance of primaries in

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[15] See Herbert McClosky, et al., "Issue Conflict and Consensus Among Party Leaders and Followers", *American Political Science Review,* 54 (June 1960), and David Nexon, "Asymmetry in the Political System: Occasional Activists in the Republican and Democratic Parties, 1956-64", *American Political Science Review,* 65 (September 1971).

the nominating system, we can move to a primary system with either a regional or a national plan, or we can maintain and perhaps strengthen the present mixed system.

Caucus Selection

Some people have looked at the recent proliferation of primaries and suggested that a return to the caucus method of selecting delegates has certain advantages. It is cheaper to campaign in a caucus state because not as much money must be spent on expensive media advertising. In a caucus state good organization counts most and a very personal type of campaigning occurs with the grass root supporters. However, if all states used the caucus system, it is doubtful that candidates would spend less money than they currently do.

Caucuses can be a powerful tool for involving more people in the party organization. In states where the caucuses have functions other than delegate selection, such as the drafting of a state party platform and nominating party and public officials, the caucus system promotes party unity and recruits workers.

Another argument for the caucus system is that it may be a more appropriate method for selecting delegates in small states, since it would save the expense of administering an election and because it is easier to have a representative convention in a small state than in a large one.

Proponents of the caucus system argue that the quality of participation in caucuses is superior to the quality of participation in primaries. Participants must attend a caucus meeting and participate in debate. Thus they make a greater commitment of time and energy than do voters who simply cast a ballot and return home.

People who oppose the caucus system generally do so on the grounds that the people who participate in it are the same old "courthouse gang" and are thus unrepresentative of voters in the electorate. Two points need to be made about this argument. The first is made by a study comparing Gallup polls

during the primary season with the outcomes of conventions from 1932 through 1972. James R. Beninger found that the vast majority of nominations have been won by the candidate who early on, consistently led the other candidates in the public opinion [30] polls.[1] This occurred despite the fact that in the majority of those conventions, delegates were chosen in some sort of party-dominated caucus system. Secondly, McGovern in 1972 won 13 of 28 caucus states even though he usually did not have the support of the "courthouse gang". Similarly in 1976, Carter, an outsider, was able to do quite well in caucus states. This is due in large part, no doubt, to the various protections for individual participants that the McGovern-Fraser and Mikulski Commissions built into the rules. It should be noted that these reforms have made the present day caucuses different from the party-dominated caucuses of the past. This probably explains why there are no significant differences between delegates from caucuses and primary states.

Others have opposed a return to the caucus system because they argue that issue enthusiasts or candidate enthusiasts can take over caucuses and that their views are not necessarily representative. This criticism is based to a large extent on experiences of caucus states in 1972. It should be noted that, as mentioned earlier, the primary electorates in 1972 were also not representative of the general electorate.

A more fundamental objection to the suggestion that more caucus systems be instituted relates to the value of maximum popular participation in the nominating process. Thus, while caucuses clearly have important party-building characteristics, they are also more burdensome and, accordingly, attract far fewer participants than do primaries. Entirely apart from the "representativeness" or "quality of participation" under each system, then, there is an important and positive value in

[1] James R. Benninger, "Winning the Presidential Nomination: National Polls and State Primary Elections, 1936-1970" *Public Opinion Quarterly*, Spring 1976.

allowing as many party adherents as possible to participate in the nominating process by eliminating all unnecessary obstacles to such participation.

The Commission in no way feels that caucus delegate selection is a less legitimate delegate selection procedure than primary selection. Both systems have inherent strengths and weaknesses, and the question of which system is better for use in particular states is a decision best made by the state party and not by direction of the National Party.

Decreasing the Role of Primaries

Others have advocated decreasing, in some way, the impact that primaries have in the nomination process. One way to do this is to limit the number of delegates to the convention that could be selected in the primaries. Delegates not selected by a primary would be selected by a party-run delegate selection system.

People who favor these proposals feel that the increase in the number of delegates chosen in primaries has [31] been detrimental to party-building efforts and has sometimes produced delegations unrepresentative of rank and file Democrats. However, opponents point out that some of these plans would require a state party to administer two delegate selection systems — a primary and a caucus system. They also point out that, since the public supports primaries, including regional and national primary plans, any move to decrease the role of the primaries could be very unpopular with rank and file Democrats.

Instead of having all delegates chosen in caucuses, some have suggested a plan that combines caucuses and primaries. This plan would have all delegates chosen through separate party processes but bound by the results of primaries in those states which have preference primaries. This is already the system which exists in most proportional representation states where the delegate candidates' names are not on the ballot

since they are selected in caucuses. Once the caucuses select a group of delegates the number of those delegates that actually go to the convention is determined by the outcome of the primary, or alternatively, the delegates for each candidate are selected after the primary has been held.

Others have suggested that improved standards be developed for the kinds of primaries that are allowed to send delegates to the convention. Standards are advocated in order to bring some order into the currently chaotic primary system, in order to assure a meaningful choice to the voters and to require states to re-examine their primaries.

The National Primary

Others have advocated increasing the use of the direct presidential preference primary through federal legislation which would mandate that states having primaries have them on the same day or that all states must have a presidential primary on the same day. There are currently six proposals before Congress, any one of which, would establish a one-day national presidential primary.[2]

The Commission is strongly opposed to proposals for a national primary. Perhaps the most important reason for its opposition is that the Commission and the Democratic Party is very concerned that the Party maintain its right to regulate its own affairs without Congressional interference. The 1976

[2] One establishes a primary on the 1st Tuesday in June for any state holding a primary election for presidential candidates (Primaries Act, Carney, Illinois). Another establishes a national primary on the first Tuesday in September with a 45% win rule (Presidential elections, Gaydos, Pennsylvania). A third proposal sets a federal primary for both days of the last weekend in June (Presidential elections, Legget, California). The final two set a national primary for the Tuesday after the first Monday in August (Presidential primaries, Weicker, Connecticut). This latter proposal is brought by the only Republican bringing a national proposal and it also includes provisions for terminating public financing of campaigns.

National Convention passed the following resolution as recommended by the Rules Committee:

> Section 5. Resolved further that this Convention, recognizing the Responsibility of our National Party to provide for our Presidential nominating process, urges the U.S. Congress to refrain from [32] intervening in these Party affairs unless and until the National Party requests legislative assistance, and in no case should Congress legislate in any manner which is in derogation of the right of a National Party to mandate its own affairs.

Proponents of the national primary concept make substantially the same arguments as do people who advocate abolishing the Electoral College. Both groups feel that any institution, be it the Convention of the Democratic Party or the Electoral College, which stands between the voters and the outcome of a nomination or election is an illegitimate interference with the people's right to freely choose public officials.

Public opinion has been consistently in favor of proposals for a national primary. Proponents of the national primary argue that it comes closest to insuring that the popular choice of the party's rank and file will receive the party's presidential nomination. However, as we have seen, turnout in presidential primaries is low and sometimes unrepresentative. The fact that the national primary appears simple and fair probably contributes to its high support in public opinion polls. Delegates to the 1976 Democratic National Convention were strongly opposed to the idea of a national primary (65% opposed and 22% in favor).

The main appeal of the national primary is its simplicity. Proponents complain that the current system is long and complicated and that it tires the candidates. Opponents point out that the job of President is also complicated and tiring and

that convenience to the candidates ought not be the guiding principle of a nominating system.

The most important objection to a national primary is that it would drastically change and possibly disrupt the institutional roles in the arena of national politics. For instance, it is highly likely that no candidate in a national primary would receive a majority of votes and that a plurality winner might be the first choice of cohesive ideological block and the second choice of very few voters. Candidates could emerge who would be unable to win the general election. The convention would become a mere ratifying body and would not be able to function as a mechanism for compromise and consensus. In a diverse country such as the United States, political stability is dependent upon the ability of the major political institutions to meld together widely disparate ideologies.

A one-day national presidential primary would probably spell the end of the national party system as we know it. A national primary could indicate trends within the public but could not resolve party conflicts. There would be [33] nobody to formulate viable public policies and make sure that the elected officials tried to bring those policies to fruition.

A national primary would also favor candidates who already had national reputations and who would buy large chunks of media. It would change the primary system from one conducted at the grass root level in many states to one conducted from television studios of the major cities.

The current primary season gives a lesser known but good candidate a chance to get some small state wins and build momentum. Another positive aspect of a long primary system is that it provides more time for the public to evaluate the candidates. Thus, the importance of a one time issue is minimized, as is the possible effect of any "dirty tricks" intended to seriously damage a candidacy. The existing system

also allows the candidate to be evaluated by groups of Democrats in different states with different issue concerns. In a national primary the candidate would have to concentrate his or her campaign in the most densely populated states that would yield the most votes.

The Regional Primary

Another set of congressional proposals for increasing the role of primaries consists of proposals for some form of mandatory regional primary as in the Ottinger plan.[3] To repeat an earlier point, the Commission is opposed to congressional intrusion into party affairs.

Another objection to plans for a regional primary is that it would be very difficult to equitably establish the sequence of regions holding primaries. Past experience has shown that the first primary has a powerful impact on subsequent primaries. In a regional plan the first region to hold its primary would, likewise, have a powerful impact on subsequent primaries.

Furthermore, the outcome of a regional plan could vary greatly depending upon which states are included in which region. The arbitrary division of the country into regions could heighten regional tensions or sectional rivalries.

Any regional plan, even if it did not mandate that states must have primaries, would probably have the effect of making states without primaries move to primaries. As mentioned

[3] The most well-known proposal is the one by Senator Packwood. It establishes five regional primaries. Under this plan states are not required to select delegates by a primary system. Similar proposals have been made by Bennett of Georgia, requiring 6 instead of 5 regions, and by Hamilton of Indiana. Ottinger of New York has proposed a system which is different from the above plans in that it requires states to select delegates by primaries in one of five mandated regions. Every state in a region would hold its primary on the same date, at 3 week intervals, from April through June of the Presidential election year.

earlier in this report, several states adopted primaries in 1976 in order to become part of a de facto regional system.

Advocates of a regional primary system maintain that the system that currently exists is exhausting to the candidates who have to crisscross the country for months prior to the convention. Because of all the travel, [34] candidates needlessly spend money as well as energy.

It has been argued that, because the system is so exhausting, good candidates are discouraged from running. Similarly, proponents argue that a less exhausting campaign would yield a higher quality campaign. According to Senator Packwood, in 1976:

> We will watch exhausted candidates wasting time on the cumbersome process rather than focusing on the issues.[4]

The regional system would not only be easier on the candidates but on the voters. Representative Ottinger has argued that one of the faults of the current system is that:

> The public will be exposed to a constant barrage of information, speculation and evaluation on and about the presidential nominating process . . .[5]

Senator Packwood maintains that:

> . . . the confusion caused by this lack of uniformity in state (primary) laws has given rise to cynicism, frustration, and distrust of the nomination process.[6]

Thus, regional primaries would simplify the process and ease cynicism on the part of the voters. A corollary of this argument is that the simpler process would increase voter turnout.

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[4] Congressional Record—Senate, 2/23/76.
[5] Congressional Record—House, 2/26/76.
[6] Congressional Record—Senate, 2/23/76.

Finally, proponents of a regional system argue that it would deflate the importance of a first primary which may have an influence on the process which is out of proportion to its size and importance in the convention and in the general election.[7]

Opponents of the regional system point out that it will not, in fact, cure all the evils of the present system and that it may have undesirable consequences as well.

They point out that the assumption that a candidate would stay in New England for two or three weeks before the primary and not be tempted to go to Los Angeles or Chicago during that time to start building support for other, later primaries which might be important for him, is unrealistic. Another unrealistic assumption is that a candidate would spend less money in a system which would require him to run in more primaries; since a probable result of even a regional plan which did not require all states to have primaries is that the actual number of primaries would increase.

Opponents further question the assumption that candidates do not focus on issues because they are too busy [35] learning the different rules in a non-standardized system. Whether or not a candidate focuses on issues probably has more to do with his style and his campaign strategy than the type of system. To the extent that regional primaries increase a candidate's dependence on television advertising, regional primaries could decrease instead of increase the time candidates spend on issues.

While some think that the current hodgepodge system turns off and confuses the voters, others point out that an advantage of the present primary system is that it allows many

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[7] Senate Packwood argued that:

> Americans will remember the state of New Hampshire, even if they do not hold the first primary... We do not need the New Hampshire primary to remind us where New Hampshire is and what it stands for. (Congressional Record—Senate, 2/23/76)

voters to look at the candidates over time and in many different contexts. The exposure to a "constant barrage of information, speculation and evaluation" that Senator Packwood laments is seen by many as a positive feature of the present system in that it educates the public.

Furthermore, there is no reason to believe that people do not vote because the primary system is not uniform, nor is there any reason to believe that regional primaries will cure the very complicated problem of low primary turnout which plagues all different kinds of primaries.

After consideration of these arguments most of the Commission opposed the concept of a regional primary system instituted either by congressional action or by party law.

Limiting the Time Span of the Delegate Selection Process

There are two plans which establish some parameters on the delegate selection system by setting dates. Congressman Morris Udall's plan provides for four dates on which primaries may be held. However, no state under this plan would be required to hold a primary.

A variation of this plan is called the "window concept". Instead of specifying dates on which primaries or caucuses must be held, this plan specifies a time period during which states must conduct their delegate selection process. The National Party could set a period of time, for instance from March to June, during which primaries or caucuses had to occur.

It should be noted that if the National Party decides to adopt either the Udall plan or a variation of the "window concept", it may have to amend Article 11, Section 8 of the Charter which reads:

> To assure that the Democratic nominee for the office of President of the United States is selected by a fair and equitable process, the Democratic National

> Committee may adopt such statements of policy as it deems appropriate with respect to the timing of Presidential primaries [36] and shall work with state Parties to accomplish the objectives of such statements, provided, however, that such statements of policy shall not be deemed to be binding upon any states in which the state laws are in conflict with such statements.

However, when legal opinion was received the opinion stated that, under the Charter and under Cousins v. Wigoda, the National Committee had the authority to implement one of these plans.[8]

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[8] Legal opinion was received from Ron Eastman, General Counsel Democratic National Committee in a letter dated January 18, 1978. The following are excerpted from it:

> "1. Does the Charter impose any restrictions on the National Party with respect to the establishment of beginning and ending dates for the delegate selection process?
>
> Article Two of the Charter prescribes the earliest possible date for the beginning of the delegate selection process. It provides, among other things: "The National Convention shall be composed of delegates who are chosen through processes... (vi) beginning within the calendar year of the Convention...." Article Two, Section 4. That requirement is subject to the proviso that fairly apportioned and openly selected state party committees which are elected no earlier than January 1 of the preceding Congressional election year from states which have no state conventions authorized to elect delegates may select "not more than 25%" of the state delegation. *Id.* The Charter imposes no restrictions as to ending dates for the process.
>
> 2. Absent or within the constraints of any Charter provision does the National Party under *Cousins v. Wigoda* have the authority to establish beginning and ending dates (Preliminary Report, Part II, p. 9, solutions a-c) for the delegate selection process?

(*footnote continues*)

Conclusion

Examining the most frequently discussed alternatives to the current system points out some of its strengths as well as some of its weaknesses. Perhaps its basic strength is that it allows the voters to study a field of candidates in many different settings. It also allows a little known candidate to emerge as the nominee.

The fact that the present system is complicated and non-standardized does not mean that it should be radically altered. Candidates and their organizations have no trouble figuring out the nomination rules and voters do not need to understand the rules governing all 50 states. What is important is that they are able to clearly express their presidential preference.

(*footnote continued*)

Under *Cousins v. Wigoda,* 419 U.S. 477 (1975), the National Party does have the authority, in my opinion, to establish beginning and ending dates for the delegate selection process subject, of course, to the restrictions the Party itself has established in the Charter. All of the possible solutions proposed in the Winograd Commission's Preliminary Report, Part II, p. 9 are within the authority of the National Party. As noted above, however, the Charter does not impose some restrictions on beginning dates for the process.

The Charter also provides that "statements of policy" "with respect to the timing of presidential primaries" shall not be deemed binding "upon any states in which that state laws are in conflict with such statements", Article XI, Section 8. Thus, except for the Charter's requirement that the process begin no earlier than January 1 of the Convention year, State law will control as to timing of presidential primaries under the Charter. That rule is tempered by Article Two, Section 2, which specifically requires the state party to take "provable positive steps" to impose legislative changes to bring state law into compliance with the Party rules where conflict exists."

It frequently happens that advocates of change claim that their reforms (in this case national and regional primaries) will cure many evils of the current system. As we have seen the agreed upon ills of the current system, its complexity or its length, may not be ills at all. Even if the length, expense and wear on candidates is seen to be a problem, there is no guarantee that national or regional primary proposals would yield better results.

More important is the fact that regional and national primary proposals could have many unintended consequences that would be harmful to the national political process.

About half of the members of the Commission would prefer a larger proportion of state caucus systems in the present national "mix" of caucus and primary systems. However, the Commission unanimously opposes any national party rule mandating one system or the other for all states and territories.

The Commission believes that the best course is to work within the existing system to establish improved standards for primary and caucus systems that will ensure that those delegate selection processes contribute to the values of openness, full participation and party building with which the Party has been concerned. With this in mind we turn to Part II of this report which is a consideration of alternatives to the existing rules governing delegate selection.

OPENNESS, PARTICIPATION AND PARTY BUILDING REFORMS FOR A STRONGER DEMOCRATIC PARTY

PART IV

DISCUSSION OF THE 1976 DELEGATE SELECTION RULES AND RECOMMENDATIONS OF THE COMMISSION ON PRESIDENTIAL NOMINATION AND PARTY STRUCTURE

The following is based on an examination of the 1976 delegate selection experience in relation to the 1976 Delegate Selection Rules. The Commission on Presidential Nomination and Party Structure voted for the recommendations for rules changes in Part IV

[68] Section 2. *Open and Crossover Primaries*

Relevant 1976 Delegate Selection Rules

2. DEMOCRATIC PARTICIPATION

> A. State Parties must take all feasible steps to restrict participation in the delegate selection process to Democratic voters only. Such steps shall be included in proposed Party rules submitted to the Compliance Review Commission of the National Democratic Party. Such rules, when approved by the Compliance Review Commission and implemented shall constitute adequate provisions within the meaning of Section 9 of the 1972 Democratic National Convention mandate.

1976 PROBLEMS

Two distinct arguments have been made in favor of banning open and crossover primaries. Some have argued that

Republicans "raid" Democratic primaries. However, the existence of "raiding" has never been conclusively proven by survey research.

Research has demonstrated that Republicans have voted extensively in certain open primaries. In an article Austin Ranney published on the 1968 Wisconsin primaries "Turnout and Representation in Presidential Primary Elections", (American Political Science Review, March, 1975.) he found that Republicans voted in the Democratic primary for McCarthy but that:

> McCarthy Republican supporters clearly did not vote for him because they thought he would be the easiest Democrat for Nixon to beat in November; they did so because they liked him and his opposition to the Vietnam war.

A stronger argument for banning open primaries is suggested by research which indicates that the Republicans who crossover have different candidate preferences from the Democratic party identifiers in the electorate. David Adamany in an article called "Crossover Voting and the Democratic Party's Reform Rules" (*American Political Science Review, June, 1976.)* found that this was the case in Wisconsin in 1972. Crossovers, he found, could result in a convention delegation which did not fairly reflect the division of preferences among Democratic identifiers in the electorate.

Some states (Alabama and Texas, for example), in an effort to discourage crossover voters, include statements on ballots binding the voter to support the election [69] results and winners. A further deterrent to crossovers occurs when a state holds state primaries simultaneously with presidential primaries.

SOLUTION A

In order to strengthen this rule and insure compliance the Commission recommends that Rule 2 impose minimum standards for restricting primaries to Democratic voters.

> Amend Rule 2A by deleting the first two sentences of Rule 2A and inserting in place thereof the following:
>
> Participation in the delegate selection process in primaries or caucuses shall be restricted to Democratic voters only who publicly declare their party preference and have that preference publicly recorded. Documentary evidence of a process which complies with this rule shall accompany all state Delegate Selection Plans upon their submission to the National Party.

SOLUTION B

The Commission recommended strengthening Rule 2A and letting the State Party know in advance what is going to happen in the event that all provable positive steps have failed by specifically exempting Rule 2A from Rule 20.

> Amend Rule 2 by adding a new paragraph lettered "B" and by relettering Rule 2B as "C". The new "B" would read as follows:
>
> B. A Rule 20 exemption shall not be granted from Rule 2A requirements.

SOLUTION C

The Commission recommends that an automatic process be adopted under which a non-complying state would shift to a delegate selection system that complies with this rule.

> Amend Rule 2 by adding a new paragraph letter "C" and by relettering current "C" as "D". The new "C" would read as follows:

C. A State Party which is precluded by state statute from complying with this rule shall adopt and implement an alternative Party-run delegate selection system which complies with this rule.

THE STATE OF WISCONSIN

[SEAL]

September 1979 Spec. Sess.
ASSEMBLY JOINT RESOLUTION 1

ENROLLED JOINT RESOLUTION

Reaffirming the firm and enduring commitment of the people of Wisconsin to the open presidential preference primary law as an integral element of Wisconsin's proud tradition of direct and effective participatory democracy and endorsing the actions taken by the attorney general to preserve and enforce the provisions of that law.

Whereas, the Wisconsin presidential preference primary has been conducted as an open primary since its inception in 1911 and is deeply rooted in the progressive, honest and corruption-free traditions of this state; and

Whereas, continuation of the open primary is essential to preserve the integrity of the voting rights of all our citizens and to assure their full and fair participation in the presidential nominating process; and

Whereas, all Wisconsin citizens are entitled to the continued free exercise of their right to vote unfettered by repugnant loyalty oaths imposed by a national political party; and

Whereas, Wisconsin's open primary law protects the voting rights of every citizen by requiring that their preferences for the respective presidential nominee be reflected in the vote of the delegates in the nominating process at the respective parties' national conventions; and

Whereas, the people of Wisconsin do not favor closing or modifying the open presidential preference primary as contained in chapters 5 and 8 of the statutes; now, therefore, be it

Resolved by the assembly, the senate concurring, That the people of Wisconsin, as represented by their legislature, reaffirm their commitment to the open primary law as essential to a fully representative and participatory democracy and the full exercise of effective voting rights; and, be it further

Resolved, That the legislature declares its firm determination to resist and oppose the current efforts by the Democratic National Committee to force Wisconsin to repudiate the open presidential preference primary law; and, be it further

Resolved, That the legislature declares that it will take such steps as may be necessary to assure that the open presidential primary, as a duly enacted law of the state of Wisconsin, is fully and lawfully enforced; and, be it further

Resolved, That each house of the legislature, pursuant to section 165.25(1) of the statutes, hereby affirms its support for the attorney general's efforts to preserve and protect the Wisconsin open presidential preference primary and requests and encourages the attorney general to take those steps deemed necessary and proper to enforce that law.

Senator Fred A. Risser President of the Senate	Representative Ed Jackamonis Speaker of the Assembly
Date	Marcel Dandeneau Assembly Chief Clerk

HISTORY OF ASSEMBLY

ASSEMBLY JOINT RESOLUTION 1, September 1979 Special Session Reaffirming the commitment of the people of Wisconsin to the open presidential primary law as an integral element of Wisconsin's proud tradition of direct and effective participatory democracy and endorsing the actions taken by the attorney general to preserve and enforce the provisions of that law.

9-5.A. Introduced by COMMITTEE ON RULES..... 1111

9-5.A. Read and referred to calendar..... 1111

9-5.A. ADOPTED..... 1111

9-5.A. Ordered immediately messaged 1111

9-5.S. Received from Assembly 686

9-5.S. Read and referred to committee on Senate Organization 686

9-5.S. Senate substitute amendment 1 offered by Senators Bablitch, Berger, Cullen, Radosevich, Braun, Van Sistine, Moody, Strohl, Roshell, Adelman, Bear, Goyke, Offner, Frank, Swan, Harnisch, Kleczka, Risser, Maurer and Flynn. 687

9-5.S. Senators Krueger, Murphy, Bidwell, Kreul, Johnston, Lorge, Chilsen, Lasee, McCallum, Theno, Opitz and Hanaway added as coauthors of Senate substitute amendment 1 687

9-5.S. Senator Thompson added as a coauthor of Senate substitute amendment 1 687

9-5.S. Senate substitute amendment 1 ADOPTED..... 687

9-5.S. CONCURRED IN as amended, Ayes 33, Noes 0 687

9-5.S. Ordered immediately messaged 688

9-5.A. Received from Senate amended and concurred in as amended (Senate substitute amendment 1) 1112

9-5.A. Assembly amendment 1 to Senate substitute amendment 1 offered by Representatives Jackamonis, Wahner, Tuczynski, Kirby, Ferrall, Rogers, Kedrowski, Andrea, Barczak,

Barry, Becker, Behnke, Bradley, Byers, Clarenbach, Coggs, Conradt, Czerwinski, DeLong, Dilweg, Donoghue, Dorff, Duren, Ellis, Everson, Fischer, Flintrop, Gagin, Gerlach, Goodrich, Harer, Harsdorf, Hasenohrl, Hauke, Helbach, Hephner, Hopkins, Johnson, Kincaid, Klicka, Laatsch, Ladwig, Lallensack, Larson, Leopold, Lewis, Lewison, Lingren, Loftus, Lorman, Luckhardt, McClain, McEssy, Matty, Medinger, Menos, Merkt, Metz, Miller, Munts, Murray, Norquist, Nelsen, Omernick, Otte, Pabst, Paulson, Plewa, Porter, Potter, Prosser, Quackenbush, Radtke, Roberts, Rooney, Rutkowski, Schmidt, Schneider, Shabaz, Shoemaker, Smith, Snyder, Soucie, Stitt, Swoboda, Tesmer, Thompson, D. Travis, R. Travis, Tregoning, Ulichny, Vanderperren, Wagner, Ward, Wood and Young 1112

9-5.A. Assembly amendment 1 to Senate substitute amendment 1 ADOPTED 1112

9-5.A. Senate substitute amendment 1 concurred in as amended, Ayes 92, Noes 1, Paired 2 1113

9-5.A. Ordered immediately messaged 1113

9-5.S. Received from Assembly amended and concurred in as amended (Assembly amendment 1 to Senate substitute amendment 1 adopted) 689

9-5.S. Assembly amendment 1 to Senate substitute amendment 1 CONCURRED IN 690

9-5.S. Ordered immediately messaged 690

9-5.A. Received from senate: assembly amendment 1 to senate substitute amendment 1 con curred in .....

9-7.A. Report correctly enrolled .....

I hereby certify that the above and foregoing is a true and correct copy of the legislative action taken on Assembly Joint Resolution 1 by the September 1979 special session of the Wisconsin Legislature.

_____

Chief Clerk of the Assembly

STATE OF WISCONSIN EX REL. BRONSON C. LA FOLLETTE,

v.

DEMOCRATIC PARTY OF THE UNITED STATES OF AMERICA,

93 Wisc. 2d. 473, 287 N.W.2d 519 (1980)

BRIEF AND APPENDIX OF PETITIONER

[29] F. *The law is rationally related to permissible objectives and serves the compelling interest of a full participatory democracy*

[32] 2. The Open Primary Law is a necessary to secure many essential interests of a democracy

First and foremost, the Wisconsin law secures an essential feature of a representative democracy by providing that all eligible voters may participate in the process of selecting a President.

This law serves additional interests which are fundamental to a democracy. In guaranteeing a private primary ballot, it serves the critical interest of privacy of political preferences and convictions. This interest is "fundamental in a free society," and the advent of the secret ballot is "one of the great political reforms." *Buckley v. Valeo*, 424 U.S. 1, 237 (1976) (Burger, C.J., concurring.)

This right of privacy also precludes the chilling effect which would befall some voters. Regular Republicans who wish to identify with a Democratic candidate in a particular year undoubtedly are deterred from doing so if they must publicly declare themselves to be Democrats. Similarly, voters who generally are independent but wish to identify with a particular candidate in a primary will be [33] deterred by a requirement to publicly surrender their neutrality.

Apart from forestalling a chilling effect on the exercise of first amendment freedoms, the Open Primary Law encourages the exercise of the associational freedoms of independents and Republicans who wish to vote in the Democratic primary in a particular year, as well as Democrats who wish to vote in the Republican primary. Unquestionably, the first amendment grants voters the right to associate with candidates by voting for them. "All political ideas cannot and should not be channeled into the programs of our two major parties." *Sweezy v. State of New Hampshire,* 354 U.S. 234, 250-251 (1957), *reh. denied,* 355 U.S. 852 (1957). "The right to vote freely for the *candidate* of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims,* 377 U.S. 533, 555 (1964). (Emphasis added.) " 'The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance.' " *Lubin v. Panish,* 415 U.S. 709, 716 (1974).

As noted, states have the prerogative to restrict these rights. *See* discussion, *supra,* pp. 13-15. But even in this [34] regard, the state's powers are not unlimited. Thus, in *Yale v. Curvin,* 345 F. Supp. 447 (3-judge court, R.I. 1972), the court struck a state law which denied the right to vote in the 1972 Democratic presidential primary where a citizen had voted in the 1970 Republican gubernatorial primary. The law had failed to consider how "loyal and attached to the policies of one of the Democratic presidential aspirants" the voter might be. 345 F. Supp. at 452. And in *Kusper v. Pontikes,* 414 U.S. 51 (1973), the Court struck Illinois' law barring voting in a primary if a person had voted in another party's primary within the preceding twenty-three months. The Illinois law impermissibly locked in the voter to his pre-existing party affiliation, and since a "prime objective of most voters in associating themselves with a particular party" is to participate in the selection process, the Illinois statute deprived the voter of "any voice in

choosing the party's candidates, and thus substantially abridged her ability to associate effectively with the party of her choice." 414 U.S. at 58.

Just as a state can limit voter affiliation with parties and candidates, within limits, so also can a state exercise its powers to promote voter rights to associate with candidates. States are the historic guardians of individual liberties, and they can grant more liberties than the federal constitution compels. *See, Oregon v. Haas,* 420 [35] U.S. 714, 719 (1975), and *State v. Doe,* 78 Wis. 2d 161, 171, 254 N.W.2d 210, 215 (1977). This principle is especially apt here inasmuch as from its inception the Federal Constitution has reposed in the states the power to determine who may participate in the process of selecting a President. U.S. Const. art. II, sec. 1. *See* discussion, *supra,* pp. *8-10.*

In protecting these privacy and associational interests, the law also produces an invaluable benefit in the life of a democracy. The Open Primary attracts candidates to Wisconsin to appeal to a wide spectrum of voters. The general electorate becomes better informed. The candidates must address a broader range of interests than if they were appealing only to Party regulars in their private meetings and caucusses.

Finally, the Presidential selection process is cleansed of the improper influences of King-caucus and backroom manipulations which gave rise to the primary in the first instance.

Many of these interests have been upheld even under a compelling interest standard. As noted, *Storer v. Brown,* 415 U.S. 724, 735 (1974), found a compelling state interest in requiring independent candidates to have been disaffiliated from partisan parties and primaries for a certain period of time to give the voters "understandable [36] choices" and a winner "with sufficient support to govern effectively." *Buckley v. Valeo,* 424 U.S. 1 (1976), upheld various federal regulations on the process of selecting a President both in primaries and in general

elections. An expenditure limitation was upheld because it "enhances the opportunity of bona fide groups to participate in the election process." *Id.* at 35. The financing of presidential elections and primaries was upheld as serving to "facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising." *Id.* at 91. And even the *appearance* of impropriety in the selection process warranted infringement on the rights of contributors to make unlimited financial donations. The restrictions could "limit the actuality and appearance of corruption resulting from large individual financial contributions." *Id.* at 26. The Court said to the extent large contributions were given to exact political quid pro quo's, "the integrity of our system of representative democracy is undermined." *Id.* at 26-27.

Supreme Court, U.S.
FILED
MAY 19 1980

No. 79-1631

In the Supreme Court of the United States

OCTOBER TERM, 1979

DEMOCRATIC PARTY OF THE UNITED STATES OF AMERICA and DEMOCRATIC NATIONAL COMMITTEE,

Appellants,

vs.

WISCONSIN ex rel. BRONSON C. LA FOLLETTE and DEMOCRATIC PARTY OF WISCONSIN,

Appellees.

On Appeal From The Supreme Court Of Wisconsin

MOTION TO DISMISS OR AFFIRM OF DEMOCRATIC PARTY OF WISCONSIN

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In the Supreme Court of the United States

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On Appeal From The Supreme Court Of Wisconsin

MOTION TO DISMISS OR AFFIRM

The appellee, the Democratic Party of Wisconsin (State Party), by its attorneys, Friebert & Finerty by Robert H. Friebert, hereby moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Wisconsin on the ground that the question on which the decision depends is so unsubstantial as not to need further argument and further upon the ground that the decision of the Wisconsin Supreme Court is in accord with the decisions of this Court. This motion is brought pursuant to Rule 16 of the Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

In 1903, Wisconsin passed its open primary law to correct one of the most serious political problems facing the country at the turn of the century. It was perceived at that time that partisan political offices were controlled by large commercial interest groups, such as railroads, and that this economic control of the political process was threatening the viability of American democracy. Statehouses were completely dominated by these commercial interest groups. At that time, United States Senators were elected by the legislative branch of state government. There was no easy entry into the political system. American democracy was as closed and as dominated by single issue interest groups as at any time in the history of the United States.

To solve this problem, Wisconsin opened up its entire political system by enacting its innovative open primary law.[1] Caucuses dominated by influential economic interest groups would no longer dictate the tone of state government.

In its present form, the Wisconsin presidential preference open primary establishes the only chance for all of the citizens of the State of Wisconsin to vote for the person they want to be President of the United States. In the general election, the choice is restricted to the nominees of the parties.

The Wisconsin open primary does not result in the election of delegates to the Democratic National Convention. The Wisconsin presidential preference primary results are utilized for the limited purpose of apportioning delegates to the various Democratic candidates for President.

---

[1] The open primary law was extended to presidential campaigns in 1905.

The actual selection of delegates commences at Congressional district caucuses organized by the State Party after the primary. The only participants in the actual selection of delegates to the national convention are persons who are willing to subscribe to the general principles of the Democratic Party and do so publicly by executing an appropriate statement to that effect. The participants in the caucuses are then separated into groups composed of persons who support and publicly pledge that support for the various candidates. It is in these resulting candidate caucuses composed of persons who have publicly declared their support of the Democratic Party and its general principles and who have further declared their support for the particular candidates involved, that the actual delegates to the national convention are selected.[2] The only impact upon the delegate selection process from the Wisconsin open primary is the apportionment of delegates to the various contenders for the Democratic nomination for President.

The National Party has a rule which limits participation in its delegate selection process to persons who openly and publicly state their adherence to the principles of the Democratic Party. The National Party rules allow a closed primary system in which persons wishing to vote in the Democratic primary must publicly register their party preference as a prerequisite to voting. Therefore, the only significant difference between the Wisconsin open

---

[2] The delegates and alternates chosen at these congressional district caucuses then choose at-large delegates and other delegates to the convention. The delegation chosen is in complete compliance with the party rules and objectives with respect to sex, race, age, religion, economic status and ethnic origin of delegates and alternates.

primary law, which the National Party challenges, and other means of apportioning delegates to the Democratic contenders for President which the National Party finds acceptable, is that the Wisconsin open primary law does not require persons who vote in the Democratic primary to state their party preference publicly as a prerequisite to voting.[3]

The National Party threatened to disqualify any delegation sent to its national convention from Wisconsin which is apportioned pursuant to the Wisconsin open primary law. As a result, the Attorney General of Wisconsin instituted this action to seek declaratory and injunctive relief to prevent the National and State Parties from carrying out that threat. The State Party cross claimed against the National Party asserting its position that its delegation chosen pursuant to Wisconsin law should be seated at the National Convention.

The National Party argued in the Wisconsin Supreme Court that its constitutional rights pursuant to the First and Fourteenth Amendments to the United States Constitution would be violated because this law conflicts with their rules. The Wisconsin Supreme Court unanimously held that no associational or speech rights of the National Party would be violated and entered a judgment so declaring the rights of the parties.

In the name of "opening" the Democratic Party, the National Party brings this appeal to the United States

---

[3] Other means of apportioning delegates which are acceptable to the National Party include a caucus system in which the persons who register with the caucuses determine the apportionment among the various candidates, and election of delegates at State Party conventions.

Supreme Court. Yet the ruling it seeks here is one which would emasculate what is perhaps the most historically significant law enacted by a state legislature in the twentieth century to open up the political process to all of the people. The Democratic Party of Wisconsin believes that this issue is not appealable as a matter of right and, in any event, that the decision of the Wisconsin Supreme Court is so clearly correct that it should be summarily affirmed.

ARGUMENT

I.
THE APPELLANTS DO NOT HAVE AN APPEAL AS OF RIGHT TO THIS COURT.

A litigant in state courts has an appeal as of right to this Court if a state court rules in favor of the validity of a state statute which is challenged on grounds "of its being repugnant to the Constitution . . . of the United States. . . ." 28 U.S.C. § 1257(2). Certiorari is appropriate where a party claims any "title, right, privilege, or immunity . . . under the Constitution. . . ." 28 U.S.C. § 1257(3).

It is not contended by the National Party that the Wisconsin law is unconstitutional on its face. Furthermore, the National Party does not appear to argue that the Wisconsin law is unconstitutional as applied. See Jurisdictional Statement, pp. 2-3. The principal claim of the National Party is that its First and Fourteenth Amendment rights are in jeopardy of being violated because it claims that its rule outlawing open primaries can supersede the Wisconsin law. The focus of this inquiry, therefore, is not upon the validity of the Wisconsin statute.

The issue is the scope and extent of the First and Fourteenth Amendment rights of the National Party and its rules *vis a vis* the Wisconsin open primary law. Consequently, the case is similar to *Hanson* v. *Denckla,* 357 U.S. 235, 244 (1958) and is not appealable as of right. Cf. *Kulko* v. *California Superior Court,* 436 U.S. 84, 90 f/n 4 (1978); *Mergenthaler Linotype Company* v. *Davis,* 251 U.S. 256, 259 (1920); *Garrity* v. *New Jersey,* 385 U.S. 493, 496 (1967); *Rohr Aircraft Corp.* v. *County of San Diego,*

362 U.S. 628, 630 (1960); *Jet Brothers Distilling Co.* v. *Carrolton,* 252 U.S. 1, 6 (1920); *Wilson* v. *Cook,* 327 U.S. 474, 482 (1946). The motion to dismiss the appeal should be granted.

II.

THE DECISION OF THE WISCONSIN SUPREME COURT IS IN ACCORD WITH THE DECISIONS OF THIS COURT.

A. A Political Party Does Not Have the Power to Override an Act of a State Legislature or an Act of Congress in the Name of Protecting its Own Perceived Right to Association and Speech. The First Amendment Rights of a Political Party, Although Great, Are Not Absolute.

The basic position of the National Party, however disguised, is that its rules and procedures are superior to the acts of Congress and the laws of all the states. On the federal level, the First Amendment claims of the National Party are so absolute as to necessarily encompass the power to veto Congressional regulation of the presidential nominating process, should Congress decide to legislate in this area. As far as Wisconsin is concerned, the National Party claims the power to effectively override the Wisconsin open primary law with respect to state and federal partisan offices. Indeed, the National and State Parties do not have to accept any primary system, according to the National Party.[4] Since it is the political

[4] The National Party sought to impose a closed caucus system in Wisconsin in 1980 in lieu of the Wisconsin open primary. The results would have been close to the Michigan closed caucus system which displaced its statutory open primary system. Only 15,000 people in the State of Michigan determined the wishes of all Democratic adherents for the entire state. See *New York Times,* Sunday, April 27, 1980, p. 1, column 2.

party that determines the procedure for selecting its candidates, any method which it chooses should be able to obliterate any state law or act of Congress to the contrary, according to the National Party.

The Supreme Court of the State of Wisconsin disagreed. It held that no decision of this Court has ever made such a broad and sweeping interpretation of the First Amendment. It noted that the decisions of this Court always clearly recognized that the states had an interest in assuring fairness in all aspects of the electoral process and that the states and Congress can constitutionally enact laws which reasonably exercise that power as long as there is no substantial burden on the associational rights of political parties. See *Marchioro* v. *Chaney,* ..... U.S. ....., 99 S. Ct. 2243 (1979); *Buckley* v. *Valeo,* 424 U.S. 1, 24-25 (1976), *Cousins* v. *Wigoda,* 419 U.S. 477 (1975); See Opinion of Wisconsin Supreme Court at Ap. app. A at 36a-42a.

B. The Wisconsin Open Primary Law Does Not Abridge Any of the Associational Freedoms of the National Party.

The Wisconsin Supreme Court recognized that the appellants had the burden of proving a substantial burden upon their associational rights. *Marchioro* v. *Chaney,* 90 Wash.2d 298, 582 P.2d 487, 493 (1978), affirmed ..... U.S. ....., 99 S. Ct. 2243 (1979) citing *American Party of Texas* v. *White,* 415 U.S. 767, 790 (1974); Opinion of Wisconsin Supreme Court, Ap. app. A at p. 18a. The only significant difference between the Wisconsin open primary and other means of apportioning delegates to the Democratic contenders for President is that the Wisconsin open primary law does not require persons to state their party preference publicly as a prerequisite to voting.

The principal reason advanced by the National Party for its opposition to open primaries is that the potential of crossover[5] voters might dilute the votes of Democratic Party adherents. The National Party has recognized that there is no evidence to show the existence of "raiding", i.e., Republican identifiers who vote in Democratic primaries for purposes of weakening the choice of the Democratic Party. See *Openness, Participation and Party Building: Reforms for a Stronger Democratic Party,* Exhibit 4 at p. 68, and, generally, Skornicka, *State Action in Presidential Candidate Selection,* 1976 Wis. L. Rev. 1269, 1301-1303. Thus, the National Party opposes open primaries because it is concerned with the *possibility* of a delegation being chosen "which did not fairly reflect the division of preferences among Democratic identifiers in the electorate." Exhibit 4 at p. 68. While that position reflects interesting theory, the fact of the matter is that the statewide outcome in Wisconsin has not been affected to date by crossover voting. See Skornicka, *supra,* at p. 1302-1303, f/n 206.

Significantly, none of the procedures which are acceptable to the Democratic Party of the United States for apportioning delegates among various candidates produces participants which come close to fairly reflecting the statistical makeup of "Democratic identifiers in the electorate". Indeed, the Wisconsin open primary might be the procedure which most accurately reflects the beliefs of all Democratic identifiers in the general electorate. In any event, there is no factual basis for concluding that the Wisconsin open primary materially interferes with the associational goals of the Democratic Party of the United States.

---

[5] Crossover in this context means independent voters who do not have any allegiance to either political party and Republicans who from time to time vote in Democratic primaries.

Exhibit 4 at pages 10 through 23 contains an extensive study of the various systems utilized for apportioning delegates. The Wisconsin open primary is also analyzed there. It is clear from these studies that closed primaries, caucuses, and conventions, as well as the Wisconsin open primary, utilize participants which vary significantly in all statistical classifications from persons who vote for the Democratic candidate at the general election. Generally speaking, all of these methods, regrettably, produce participants who are better educated, wealthier, whiter, and younger than the Democratic identifiers who vote in the November elections. The rank and file of the Democratic Party is significantly underrepresented in all systems utilized for apportioning delegates. "Wisconsin's Open Primary produces an electorate which is as representative (or as unrepresentative) of 'Democratic identifiers in the electorate' as is the electorate produced by closed primaries and caucuses which are acceptable to the National Party." Opinion of Wisconsin Supreme Court, Ap. app. A, p. 26a. Thus, the Wisconsin open primary does not interfere with the goals of the National Party.

Indeed, in many statistical categories the Wisconsin open primary produces a more representative electorate when compared to the general election Democratic voters than any other system for apportioning delegates. For example, at page 14 of Exhibit 4, it is stated:

> "Limited evidence on 1976 suggests that while there may be a slight tendency for conservatives to be underrepresented in Democratic primary elections (due to the fact that the overrepresented, college educated tend to be more liberal), the two electorates may not be as distant as they were in 1972. For instance, the Wisconsin primary electorate had fewer people classifying themselves as conservatives but about the same number classifying themselves as liberals in the general electorate."

Thus, Wisconsin's Open Primary has been singled out as demonstrative of a primary electorate which comes close to the Democratic general electorate in November. Such a result is hardly adverse to the associational rights of the National Party. The Wisconsin Supreme Court realistically evaluated the facts and found no interference.

There is more than one way to dilute the preferences of democratic adherents. The National Party would have imposed a caucus system on Wisconsin had the Wisconsin Supreme Court failed to act. A caucus system represents a most serious dilution of the preferences of democratic adherents. Studies from other states demonstrate that there are very few voters who participate in caucuses. Less than 4% of the voters engage in such proceedings and those who do participate are completely unrepresentative of the rank and file of the Democratic Party. See Exhibit 4 at p. 15, and f/n 4, *supra,* p. 7, regarding the 1980 Michigan caucus system. Many democratic adherents are excluded from participation by the mere fact that the vast majority of democratic adherents do not participate in caucuses. Thus, the preferences of democratic adherents are diluted by nonparticipation. When the Wisconsin open primary is pitted against a caucus, the Wisconsin open primary poses no threat to the associational objectives of the National Party.

Another feature of the Wisconsin open primary which demonstrates that it does not interfere with the associational rights of the National Party is the fact that the delegates chosen in party caucuses by publicly declared Democrats are only required to vote for the candidates apportioned by the open primary on the first ballot and "on any additional ballot, unless released by said candidate, [or] until said candidate *fails to receive at least one-third of the votes authorized to be cast. . . .*" (Em-

phasis supplied). Section 8.12(c)(5), Wis. Stats.; Ap. app. A, pp. 58a-59a.

The National Party theorizes that the Wisconsin Open Primary could have an adverse impact upon the candidate selection process at its national convention. Just what that impact might be, however, apparently is hard to describe. If the Wisconsin open primary delegation helps a first ballot nomination, then, obviously, the Wisconsin open primary results are significantly in accord with other Democratic voter preferences from all over the country and cannot be deemed to have interfered with the National Party. Should the balloting proceed beyond the first ballot, then the Wisconsin delegates who were pledged to a candidate who did not receive at least one-third of the delegate votes from all national convention delegates in the first ballot are released under Wisconsin law to "vote according to [their] own judgment." *Id.* Those delegates would then become uncommitted under Wisconsin law and can vote any way they want to. This weening process is repeated on every succeeding ballot until a Presidential candidate is chosen. Since the delegates can only be persons who are chosen in full compliance with the rules of the National Party, it is difficult to conceive of any set of circumstances in which the open primary of Wisconsin would in any way interfere with the nomination process.

The Wisconsin Supreme Court recognized that there was no impact upon any of the associational rights of the National Party. Since that is the case, the National Party is presenting a theoretical problem to this Court. As noted recently in another setting, theoretical problems which are not in accord with reality do not merit interference with state law. Cf. *Mobil Oil Corp.* v. *Commissioner*

of Taxes of Vermont, ... U.S. ....., 48 U.S.L.W. 4306, 4311 (1980). In reality, there is no impact upon the associational rights of the National Party and, therefore, the decision of the Wisconsin Supreme Court declaring that the National Party cannot refuse to seat a Wisconsin delegation on the ground that that delegation was apportioned pursuant to the results of the Wisconsin open primary was completely in accord with decisions of this Court.

The decision of the Wisconsin Supreme Court should be summarily affirmed, should the Court conclude that it has appellate jurisdiction. Alternately, should the Court conclude that it does not have appellate jurisdiction, the Court should deny certiorari. See 28 U.S.C. § 2103.

CONCLUSION

On the basis of the foregoing, it is respectfully requested that the Court either dismiss the appeal or affirm the judgment of the Wisconsin Supreme Court.

Dated this 12th day of May, 1980.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1631

DEMOCRATIC PARTY OF THE
UNITED STATES OF AMERICA and
DEMOCRATIC NATIONAL COMMITTEE,
Appellants,

vs.

STATE OF WISCONSIN ex rel.
BRONSON C. LA FOLLETTE
and DEMOCRATIC PARTY OF WISCONSIN,
Appellees.

ON APPEAL FROM THE
SUPREME COURT OF WISCONSIN

MOTION TO DISMISS OR AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1631

DEMOCRATIC PARTY OF THE
UNITED STATES OF AMERICA and
DEMOCRATIC NATIONAL COMMITTEE,
Appellants,

vs.

STATE OF WISCONSIN ex rel.
BRONSON C. LA FOLLETTE
and DEMOCRATIC PARTY OF WISCONSIN,
Appellees.

MOTION TO DISMISS OR AFFIRM

The appellee State of Wisconsin moves the Court to dismiss the appeal or, in the alternative, to affirm the judgment of the Supreme Court of Wisconsin on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

JURISDICTION

The appellee State of Wisconsin agrees that this case is an appeal within the meaning of 28 U.S.C. § 1257(2).

QUESTION PRESENTED

The State disagrees with the appellants' statement of the question presented.

The question presented is whether the State may, consistent with its long-established constitutional power to regulate the integrity of the electoral process, choose to enable Democratic voters in a presidential primary election to select their party privately and without a public declaration of party loyalty.

The State cannot agree with the appellants' proposed statement of the second question. Appellants, hereafter collectively the "National Party," state the second question to be whether the State can prevent the National Party from determining the qualifications and eligibility of delegates to the national convention.

The reason this second issue is not presented is that the "Wisconsin statute explicitly states that '[t]he method of selecting the delegates or alternates shall be determined by the state party organization.' Sec. 8.12(3) (b), Stats." *State ex rel. La Follette v. Democratic Party,* 93 Wis. 2d 473, 485, 287 N.W.2d 519, 523 (1980) (A-Ap. 6a.) The Wisconsin law "does not govern the selection or qualification of delegates to the national convention." 93 Wis. 2d at 525, 287 N.W.2d at 542. (A-Ap. 41a.) Indeed, the parties stipulated that delegate selection "is under the control and direction" of the Democratic Party of Wisconsin, hereafter the "State Party." 'Stip., par. 19; A-Apee. 9b.)

STATEMENT OF THE CASE

Wisconsin law does not permit any voter to vote in the Democratic primary without regard to party affiliation. Rather, the State Legislature intended that "voters should vote only on the ballot of the party they claim as theirs and that they will not vote on the ballot of a party with which they do not identify." 93 Wis. 2d at 504, 287 N.W.2d at 532. (A-Ap. 23a.)

What characterizes the Wisconsin system as an "open" primary is that the "voter is not required to declare publicly a party preference or to have that preference publicly recorded. Each voter makes a choice of party in the privacy of the voting booth." 93 Wis. 2d at 485, 287 N.W.2d at 523. (A-Ap. 6a.)

The Wisconsin voter votes for candidates, not delegates. The State Party chooses the delegates after the primary. The sole function of the primary is to apportion the number of delegates among the Party's candidates in accord with the results of the primary. 93 Wis. 2d at 485-86, 287 N.W.2d at 523-24. (A-Ap. 6a-7a.)

The National Party's Rule 2A provides that "Democratic voters only who publicly declare their party preference and have that preference publicly recorded" may participate in the "delegate selection process." (Appellants' Jur. Statement, p. 4; A-Ap. 8a.) In July 1979 the Compliance Review Commission (CRC) of the National Party rejected the delegate selection plan of the Democratic Party of Wisconsin because "participation in the April 1, 1980 Wisconsin presidential preference primary is not restricted to Democratic voters who publicly declare their party preference and have that preference publicly recorded," and the State Party had presented no alternative. (Stip., par. 14; A-Apee. 7b; 93 Wis. 2d at 489, 287 N.W.2d at 525, A-Ap. 10a.)

Under National Party rules, no Wisconsin delegation will be seated at the national convention unless in compliance with Rule 2A. (Stip., pars. 11, 17; A-Apee. 6b, 8b.)

The State commenced this action as an original action before the Wisconsin Supreme Court. The State named both the National Party and the State Party as respondents. The State Party responded by agreeing that State law validly may be applied against it and the National Party. The State Party cross-claimed against the National Party, asking the court to order the National Party to recognize its delegation selected in accord with Wisconsin law. The National Party defended on the ground that the Wisconsin law offends the first and fourteenth amendments to the United States Constitution.

The Wisconsin Supreme Court, after receiving briefs, hearing oral argument, and reviewing the parties' stipulated facts, entered its decision and judgment on January 19, 1980. It concluded that the National Party had failed to show that its requirement of a public declaration of Party affiliation served to keep nonDemocrats from participating in the Democratic primary. "Both the closed and open primary depend on the honesty and integrity of the voters." 93 Wis. 2d at 510, 287 N.W.2d at 535. (A-Ap. 27a-28a.) The National Party's own evidence showed there are no differences in results or representativeness in open as opposed to closed primaries. 93 Wis. 2d at 507-08, 287 N.W.2d at 534. (A-Ap. 25a-26a.) Since the required public declaration of Party loyalty only deters voting, the court concluded the essential difference between Wisconsin's open primary and a closed primary is that in the former more people vote on the ballot of their party, not that more nonDemocrats vote on the Democratic ballot. 93 Wis. 2d at 511-12, 287 N.W.2d at 535-36. (A-Ap. 29a.)

As a result, the court concluded that the open primary law, by granting voters a right of privacy in party selection, does not impose a substantial burden on the associational rights of the National Party, and that any burden "appears speculative, remote and minimal." 93 Wis. 2d at 511, 287 N.W.2d at 536. (A-Ap. 29a.)

The court also found that the State has a compelling interest in maintaining its open primary even if there were a substantial burden on the National Party's associational freedoms. The State's interest, the court said, is to preserve the overall integrity of the electoral process by providing secrecy of the ballot, thereby encouraging increased voter participation and ensuring that the primary itself and the political party's participating in the primary are conducted in a fair and orderly manner. 93 Wis. 2d at 512, 287 N.W.2d at 536 (A-Ap. 30a.) The interest of privacy of the ballot is "'fundamental in a free society.'" 93 Wis. 2d at 512, 287 N.W.2d at 536. (A-Ap. 30a.) Voting is encouraged, which in turn fosters democratic government. 93 Wis. 2d at 512-13, 287 N.W.2d at 536. (A-Ap. 31a.) Further, a public declaration would interfere with the State's entire electoral system which is based on secrecy of the ballot and nondisclosure of party preference in the case of hundreds of partisan and nonpartisan offices in the state. 93 Wis. 2d at 513-14, 287 N.W.2d at 537. (A-Ap. 31a-32a.) And the open primary is deeply engrained in Wisconsin's traditions and culture: for almost the whole of the 20th century it has "functioned well in the state of Wisconsin for the citizens and for the political parties." 93 Wis. 2d at 514, 287 N.W.2d at 537 (A-Ap. 32a.)

Having concluded that the open primary law is constitutional, the court turned to a remedy. Unlike the situation in *Cousins v. Wigoda,* 419 U.S. 477 (1975), the

"Attorney General and the State Party ... are not arguing that the National Party must seat any delegates selected by the State Party in accordance with Wisconsin law." Rather, they sought an order that the National Party "cannot refuse to seat the Wisconsin delegation on the sole ground that the delegation was apportioned by utilizing the results of a primary in which no public declaration of party preference was required." 93 Wis. 2d at 522, 287 N.W. 2d at 541. (A-Ap. 38a-39a.) The court entered judgment accordingly. 93 Wis. 2d at 525-26, 287 N.W.2d at 543. (A-Ap. 42a.)

ARGUMENT

This Case Does Not Present A Substantial Federal Question

A. The State law does not interfere with private associational freedoms

The State law permits voters in a presidential primary to select their candidate and party privately. Thus, it operates on the Party only in respect to its public function in the process of selecting a President.

Accordingly, this case is wholly unlike the private associational freedoms at stake in *Cousins v. Wigoda,* 419 U.S. 477 (1975). That case concerned the Party's interest in resolving " 'intra-party disputes' " as to which slate of delegates should be seated. 419 U.S. at 491. This Court said "Illinois' interest in protecting the integrity of its electoral process cannot be deemed compelling in the context of the selection of delegates to the National Party Convention." *Id.*

Here, the State Party, not the State, selects the delegates. 93 Wis. 2d at 485, 525, 287 N.W.2d at 523, 542. (A-Ap. 6a, 41a.)

Cousins v. Wigoda is no broader than protecting the Party's associational right to select delegates. First, this Court said the only question presented there was whether state law had "primacy ... over the National Political Party's rules in the determination of the qualifications and eligibility of delegates to the Party's National Convention." 419 U.S. at 483 and n. 4. Second, *Cousins* has been read only as protecting the Party's rights to set delegate qualifications. *Fallon v. St. Bd. of Elections of the St. of New York,* 408 F. Supp. 636, 638 and n. 3 (S.D. N.Y. 1976). Third, this Court has cited *Cousins* as recognizing the power of a state to significantly interfere with protected rights of political association if it demonstrates a sufficiently important interest and employs narrowly drawn means. *Buckley v. Valeo,* 424 U.S. 1, 24, 25 (1976). And most recently in *Marchioro v. Chaney,* _____ U.S. _____, 99 S.Ct. 2243 (1979), this Court upheld state regulations of political parties in recognition of the "critical role played by political parties in the process of selecting and electing candidates for state and national office," 99 S.Ct. at 2246, distinguishing cases where the state sought to regulate "internal party" matters, *id.* at 2247-48, and distinguishing *Cousins* as involving a "substantial burden on associational freedoms." *Id.* at 2248, n. 15.

In its stipulation here, the National Party agreed that the fact that the delegation selected was bound to certain candidates caused it no concern. (Stip. par. 19; A-Apee. 9b.) Its sole objection is that, in voting for the candidates to which the delegates are bound, the voter need not publicly declare his loyalty to the Party. (Stip. par. 18; A-Apee. 8b-9b.)

Consequently, this case does not involve the internal party matter of selecting the delegates to attend the national convention. Rather, it involves the state right to regulate the public function of picking a

President by granting voters at the primary the right to pick their candidate and party privately and without a public declaration.

B. The state law relates only to the public function of affecting voter rights in the process of choosing a President

The state law concerns only the governmental process of choosing a President by granting to primary voters the right to select their candidate and party privately and without a public declaration.

The National Party, because it is so integral a part of the process of choosing a President, is not merely a private club. This Court has upheld state election laws which "recognize the critical role played by political parties in the process of selecting and electing candidates for state and national office." *Marchioro v. Chaney*, _____ U.S. _____ 99 S.Ct. 2243, 2246 (1979).

The reason this Court has acknowledged state power to impose even "substantial restriction on the right to vote or to associate" is that "under our Constitution ... the States are given the initial task of determining the qualifications of voters," and this power relates as well to the "selection and qualification of candidates." *Storer v. Brown*, 415 U.S. 724, 729-30 (1974). This power is especially strong in respect to the Presidency, for the electoral college established by U.S. Const. art. II, sec. 1, enables each state to "appoint, in such manner as the legislature thereof may direct, a number of electors" who choose the President. The State's authority under this grant of power is "extensive." *Williams v. Rhodes*, 393 U.S. 23, 29 (1968).

The State's power to determine the qualifications of voters and regulate the conduct of elections is well established. *Marchioro v. Chaney,* ——— U.S. ———, 99 S.Ct. 2243, 2246 (1979); *Storer v. Brown,* 415 U.S. 724, 729-30 (1974); *Kusper v. Pontikes,* 414 U.S. 51, 57 (1973); *Rosario v. Rockefeller,* 410 U.S. 752 (1973), *reh. denied,* 411 U.S. 959 (1973); *Bullock v. Carter,* 405 U.S. 134, 141 (1972); *Gray v. Sanders,* 372 U.S. 368, 379 (1963); *United States v. Classic,* 313 U.S. 299, 311 (1941); *Mason v. Missouri ex rel. McCaffery,* 179 U.S. 328 (1900); *In re Green,* 134 U.S. 377 (1890); *McPherson v. Blacker,* 146 U.S. 1, 28, 35-36, 39 (1892). *Also see Cousins v. Wigoda,* 419 U.S. 477, 495-96 (1975) (concurring opinion).

The states' power is no less extensive in a presidential primary. "As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made." *Newberry v. United States,* 256 U.S. 232, 286 (1921) (Mr. Justice Pitney, dissenting). The primary is not merely a "warm-up" but is an "integral part of the entire election process." *Storer v. Brown,* 415 U.S. 724, 735 (1974). Indeed, this Court has found that the racially discriminatory action of the political parties in the conduct of primaries to be state action because of the effect on who ultimately would govern. *White Primary Cases: Terry v. Adams,* 345 U.S. 461 (1953), *reh. denied,* 345 U.S. 1003 (1953); *Smith v. Allwright,* 321 U.S. 649 (1944); and *Nixon v. Condon,* 286 U.S. 73 (1932).

As a result, this Court has recognized the power of the states to regulate voting rights in a primary as well as the rights of primary voters to be protected against undue state regulation. *Rosario v. Rockefeller,* 410 U.S. 752 (1973), *reh. denied,* 411 U.S. 959 (1973); *Kusper v. Pontikes,* 414 U.S. 51 (1973). These voting rights are "fundamental" because "preservative of all

rights." *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886), and no right is "more precious." *Reynolds v. Sims,* 377 U.S. 533, 562 (1964).

On the basis of this authority, the Wisconsin court correctly described the State's legitimate and compelling interest, 93 Wis. 2d at 512, 287 N.W.2d at 536 (A-Ap. 30a):

> The state's interest in maintaining a primary and in not restricting voting in the presidential preference primary to those who publicly declare and record their party preference is to preserve the overall integrity of the electoral process by encouraging increased voter participation in the political process and by providing secrecy of the ballot, thereby ensuring that the primary itself and the political party's participation in the primary are conducted in a fair and orderly manner.

C. The Wisconsin law imposes no substantial burden on the National Party

The State, by granting voters a right to choose their candidate and party privately so as to encourage voter participation, imposes no substantial burden on the National Party.

The Wisconsin court said that, even if the National Party has an associational right to have only Democratic voters participate in a Democratic presidential primary, it nevertheless had failed to meet its burden of showing that the Wisconsin law impaired that interest. 93 Wis. 2d at 497-99, 287 N.W.2d at 529-30. (A-Ap. 17a-18a.)

The Party's goal is to provide "easy access and frequent opportunity for unaffiliated voters to become

Democrats." *Mandate for Reform,* C-3, p. 47; ex. 2. As a consequence of the ease in becoming a Democrat, the decision is wholly subjective: no tests or criteria are imposed. The court correctly deduced, then, that a public declaration that one is a Democrat means that at the time of voting the voter is not an adherent of or loyal to another party but supports the Democratic party, its candidates, and issues. 93 Wis. 2d at 502-03, 287 N.W.2d at 531-32. (A-Ap. 21a.)

Nothing in the State law interferes with the Party's goal of having only Democrats participate or of easing the access of unaffiliated voters by having the voter self-determine his party affiliation. Indeed, state law encourages voters to vote only in the party primary with which they affiliate. A split ballot is not permitted: the voter may vote in the primary of only one party. To cross over into another primary, the voter must sacrifice participation in his own party's primary. Further, the voter dissatisfied with the named candidates need not cross over to express himself; he may write in another name or vote for none-of-the-names-shown, thereby asking for an uninstructed delegation. 93 Wis. 2d at 504-05, 287 N.W.2d at 532-33. (A-Ap. 23a.)

Moreover, the publicly recorded loyalty oath does not keep out nonDemocrats more effectively than the open primary. In closed primary states, the independent voter simply signs up as a party loyalist. Hedlund, *Cross-Over Voting in a 1976 Open Presidential Primary,* 41 Public Opinion Quarterly 498, 501, 504 (1977-78). Since you are a Democrat if you say you are, "[o]ne can only conclude that the so-called 'closed' primaries are just a hair more closed than the so-called 'open' primaries." Ranney, *Curing the Mischiefs of Faction* 166-67 (1975).

The loyalty oath functions only to deter voting. Voters either do not understand the significance of a

public declaration, believe they are barred for not paying dues, or " 'resent being prohibited from voting if they refuse to make a party declaration and having their affiliation a matter of public record for fear of losing their jobs or risking other penalties.' " 93 Wis. 2d at 510, 287 N.W.2d at 535. (A-Ap. 29a.) (Footnote omitted.)

Nor is there any evidence crossovers alter election results. Republicans who cross over into the Democratic primary are so few in number as to have a negligible impact on outcome. Hedlund, *Cross-Over Voting in a 1976 Open Presidential Primary,* 41 Public Opinion Quarterly 498, 503, 513 (1977-78). Those who do cross over are not hostile: in 1968 they did not vote for McCarthy "because they thought he would be the easiest Democrat for Nixon to beat in November; they did so because they liked him and his opposition to the Vietnam war." Ranney, *Turnout and Representation in Presidential Primary Elections,* 66 American Political Science Review, 21, 35 (1972). Closing a primary will not alter the impact from the independent vote since they would participate anyway. Hedlund, *Cross-Over Voting in a 1976 Open Presidential Primary,* 41 Public Opinion Quarterly, 498, 504, 513 (1977-78).

The National Party's own studies show an open primary does not alter results. In a study of all primaries, even those closed primaries the National Party accepts, the conclusion was the general electorate "is as unrepresentative of Democratic Party identifiers as previous primary electorates." Winograd, *Openness, Participation and Party Building: Reforms for a Stronger Democratic Party,* p. 14 (1978); ex. 4. Further, in those primaries the participants "did not produce an outcome significantly different from that which would have occurred with a more representative primary electorate." *Id.* at 14-15. *See* Comment, *State Action in Presidential Candidate Selection,* 1976 Wis. L. Rev. 1269, 1301-02, n. 206.

Accordingly, on the record, the court drew the only reasonable inference: Wisconsin's grant of a privacy right in party selection only increases voter participation and imposes no substantial burden on the National Party. "Indeed any burden appears speculative, remote and minimal." 93 Wis. 2d at 511, 287 N.W.2d at 536. (A-Ap. 29a.)

D. The State's interest is compelling

The Wisconsin court described the State's interest as follows, 93 Wis. 2d at 512, 287 N.W.2d at 536 (A-Ap. 30a.):

> The state's interest in maintaining a primary and in not restricting voting in the presidential preference primary to those who publicly declare and record their party preference is to preserve the overall integrity of the electoral process by encouraging increased voter participation in the political process and by providing secrecy of the ballot, thereby ensuring that the primary itself and the political party's participation in the primary are conducted in a fair and orderly manner.

The public declaration of party loyalty can only interfere with the objective of increased voter participation. With the rising number of independent voters, the State could choose to induce their participation in the democratic process through guaranteed privacy in party affiliation when voting.

The State law also serves the objective of easing the way for voters to exercise their own associational freedoms in identifying with parties and candidates. And the privacy of the voting booth is "fundamental in a free society," being "one of the great political reforms." *Buckley v. Valeo,* 424 U.S. 1, 237 (1976) (Burger, C.J., concurring).

Finally, the open primary is deeply woven into the fabric of Wisconsin's electoral processes and its political institutions and culture. Hundreds of partisan and nonpartisan elections are held under the open primary system. For virtually the whole of this century, the commitment to the open primary has stimulated popular political participation to end boss rule, corruption, and fraudulent practices of parties. 93 Wis. 2d at 490, 492, 514, 287 N.W.2d at 526, 527, 537, and n. 14. (A-Ap. 10a, 12a, 31a-32a.) It has "functioned well ... for the citizens and for the political parties." 93 Wis. 2d at 514, 287 N.W.2d at 537. (A-Ap. 32a).

In granting voters a right to associate with a party privately in the voting booth, the State has taken care not to interfere with the Party's protected freedoms. The State Party determines the method for selecting delegates. Voting by nonDemocrats is discouraged by permitting a vote only on one party's ballot and providing the alternatives of write-ins or none-of-the-above. Privacy stimulates voter participation and the exercise of free choice in party identification. A full participatory democracy results, as does the effectiveness of elected officials to govern.

The consequence is to preserve the integrity of the electoral process without any significant interference with Party interests.

CONCLUSION

Appellee State of Wisconsin respectfully submits that the question upon which this cause depends is so unsubstantial as not to need further argument, and the State respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment of the Wisconsin Supreme Court.

Respectfully submitted,

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APPENDIX

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STIPULATION OF FACTS 1b

STATE OF WISCONSIN

IN SUPREME COURT

STATE OF WISCONSIN ex rel.
BRONSON C. LA FOLLETTE,
Petitioner,

v. Case No. 79-1328-OA

DEMOCRATIC PARTY, etc.,
et al.,
Respondents.

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties to this stipulation by their undersigned counsel, as follows:

A. *The Parties.*

1. Petitioner Bronson C. La Follette is the Attorney General of Wisconsin. He brings this action on behalf of the State of Wisconsin, pursuant to the authority of its Governor and on behalf of the citizens of the State of Wisconsin.

2. Respondent Democratic Party of the United States of America (hereafter "National Party") is a voluntary unincorporated association and a national political party whose purposes include: (a) nominating and assisting in the election of Democratic candidates for the offices of President and Vice President of the United States; (b) adopting and promoting statements of policy; (c) assisting state and local Democratic Party organizations in the election of their candidates and the education of their voters; (d) establishing standards and rules of procedure to afford all members of the Democratic Party full, timely, and equal opportunities to participate in decisions concerning the selection of candidates, the formulation of policy, and

the conduct of other party affairs, without prejudice on the basis of sex, race, age (if of voting age), religion, economic status, or ethnic origin, and, further, to promote fair campaign practices and the fair adjudication of disputes; and (e) working with Democratic public officials at all levels to achieve the objectives of the National Party.

3. Respondent Democratic National Committee (hereafter "DNC") has general responsibility for the affairs of the National Party between National Conventions, subject to the provisions of the Party's Charter and resolutions or other actions of the National Convention. Its responsibilities include issuing the Call to the National Convention, which establishes the delegate selection rules for the National Convention.

4. Respondent Democratic Party of Wisconsin (hereinafter "State Party") is a Wisconsin voluntary, unincorporated association organized as a political party to promote and preserve liberal, democratic government. To achieve these goals, the State Party promotes and supports candidates who are committed to the principles and objectives of the State and National Parties; conducts caucusses, meetings and a state convention; formulates policy; and promotes the full participation in its affairs without prejudice on the basis of sex, race, age, religion, economic status, or ethnic origin. The State Party is associated with the National Party and elects the Wisconsin members of the DNC.

B. *The National Party's Delegate Selection Rules.*

5. Article Two, Section 4 of the Charter of the Democratic Party of the United States ("Charter"), adopted in December, 1974, provides that:

The National Convention shall be composed of delegates who are chosen through processes which (i) assure all Democratic voters full, timely and equal opportunity to participate and include affirmative action programs toward that end, (ii) assure that delegations fairly reflect the division of preferences expressed by those who participate in the Presidential nominating process, (iii) exclude the use of the unit rule at any level, (iv) do not deny participation for failure to pay a cost, fee or poll tax, (v) restrict participation to Democrats only, and (vi) begin within the calendar year of the Convention.

6. The DNC adopted the Delegate Selection Rules for the 1980 Convention ("Rules") on June 9, 1978.

7. Rule 2 provides:

PARTICIPATION

A. Participation in the delegate selection process in primaries or caucuses shall be restricted to Democratic voters only who publicly declare their party preference and have that preference publicly recorded. Documentary evidence of a process which complies with this rule shall accompany all state Delegate Selection Plans upon their submission to the National Party. Such rules, when approved by the Compliance Review Commission and implemented shall constitute adequate provisions within the meaning of Section 9 of the 1972 Democratic National Convention mandate.

B. A Rule 20 exemption shall not be granted from Rule 2A requirements.

C. A State Party which is precluded by state statute from complying with this rule, shall adopt and implement an alternative party-run delegate selection system which complies with this rule.

D. State Parties shall take all feasible steps to encourage non-affiliated and new voters to register or enroll as Democrats and to provide simple, easy procedures through which they may do so.

E. No person shall be excluded from any stage of the delegate selection process for failure to pay a cost or fee.

8. Rule 12 provides in part:

FAIR REFLECTION OF PRESIDENTIAL PREFERENCES

A. The Call for the 1980 Democratic National Convention shall include provisions that assure that the delegates to the 1980 Democratic National Convention be chosen in a manner which fairly reflects the division of preferences by those who participate in the presidential nominating process in each state, territory and the District of Columbia.

B. At all stages of the delegate selection process, delegates shall be allocated in a fashion that fairly reflects the expressed presidential preference or uncommitted status of the primary voters or if there is no binding primary, the convention and caucus participants, except that

preferences securing less than the applicable percentage of votes cast for the delegates to the National Convention shall not be awarded any delegates. ... The CRC shall adopt regulations to prevent winner-take-all outcomes at the Congressional District or other smaller delegate selection unit. The CRC shall adopt regulations to govern the allocation of delegates in instances where no candidate reaches the applicable percentage.

C. At the level at which the National Convention delegates are selected, delegate selection systems which permit a plurality of votes to elect all of the delegates from that level shall not be used. Under no circumstances shall the use of single member delegate districts be permitted. State Democratic Parties shall ensure that District lines are not gerrymandered in order to discriminate against blacks or any other racial or ethnic minority. For purposes of these rules, plurality is defined as the most votes received by a candidate, whether or not that vote was the majority of the votes cast.

D. For the purpose of fairly reflecting the division of preferences, the non-binding advisory presidential preference portion of primaries shall not be considered a step in the delegate selection process.

9. Rule 20 provides:

STATE LEGISLATIVE CHANGES

A. Wherever any part of any section contained in these rules conflicts with existing state laws, the State Party shall take provable positive steps to achieve legislative changes to bring the state law into compliance with the provisions of these rules.

B. Provable positive steps shall be taken in a timely fashion and shall include the drafting of corrective legislation; public endorsement by the State Party of such legislation; efforts to educate the public on the need for such legislation; active support for the legislation by the State Party lobbying state legislators, other public officials, Party officials and Party members; and encouraging consideration of the legislation by the appropriate legislative committees and bodies.

C. A State Party may be required to adopt and implement an alternative Party-run delegate selection system which does not conflict with these rules, regardless of any provable positive steps the state may have taken.

10. Pursuant to its authority under Article Three, Section 1 of the Charter, the DNC adopted the Final Call for the 1980 Democratic Convention ("the Call") on May 25, 1979, incorporating the Rules. The Call formally establishes the date of the Convention, the qualifications for delegates, the Convention's procedures, and other rules essential to the conduct of the Convention.

11. The Call provides that "delegates and alternates to the 1980 Democratic National Convention shall be selected in accordance with the Delegate Selection Rules." Compliance with said Rules is a condition the State Party must meet in order to participate in any respect at the national convention.

12. The Rules authorize the Compliance Review Commission ("CRC") to "review Delegate Selection Plans submitted by State Parties and approve or recommend changes in such plans."

13. On May 11, 1979, the Chairman of the State Party transmitted the Wisconsin Delegate Selection Plan for 1980 to the CRC.

14. On July 12, 1979, the CRC reviewed and considered the Wisconsin Delegate Selection Plan. The CRC determined that the Plan did not comply with the Rules because participation in the April 1 Wisconsin primary is not restricted to Democratic voters only who publicly declare their party preference and have that preference publicly recorded, and because the State Party had not adopted and implemented an alternative Party-run delegate selection system.

15. On July 19, 1979, the CRC notified the Chairman of the State Party that it found the Plan did not meet the requirements of the Rules and the Call.

C. *Past methods of delegate selection and changes required by DNC rules.*

16. In 1976 the Wisconsin Open Primary was utilized for the purpose of apportioning the number of delegates to the various candidates for President of the United States according to the percentage of the vote in each congressional district and the state at-large. Those delegates were bound to vote the preferences expressed in the primary. Wisconsin voters did not elect delegates and alternates to the National

convention at the Wisconsin Open Primary. The selection of the actual delegates was conducted at the caucusses attended by persons who publicly declared themselves to be Democrats and in complete compliance with the DNC rules and objectives with respect to the sex, race, age, religion, economic status, and ethnic origin of the delegates and alternates. Thus, in 1976, of the Wisconsin delegates and alternates to the Democratic National Convention, 58 delegates and 36 alternates were chosen at congressional district caucusses conducted by the State Party. Ten delegates and eight alternates were chosen as at-large delegates and alternates by the delegates and alternates chosen at the congressional district caucusses. Under the applicable Rules of the National Party in 1976, it was possible to obtain an exemption from Rule 2 of the DNC Rules which require that "participation in the delegate selection process be restricted to Democratic voters only" who publicly declare their party preference and have that preference publicly recorded. The State Party obtained such an exemption in 1976.

17. On June 9, 1978, the DNC adopted Delegate Selection Rules including Rule 2B, which is quoted in paragraph 7 of this stipulation. Thus, the 1980 Rules preclude obtaining an exemption from Rule 2A. The effect of this change is that a Wisconsin delegation which is apportioned to candidates on the basis of the results of the Wisconsin Open Primary will not be seated. The only Wisconsin delegation which will be seated is one which complies with all of the National Party's Rules including Rule 2A.

18. The essential difference between the process under the Open Primary and the DNC's Delegate Selection Rules concerns who participates in the determination of what proportion of the delegates are allotted to the respective candidates. Under the Open

Primary Law, nominee preference and apportionment is measured by the results of the Open Primary in the spring. Voters can vote in the primary without publicly declaring their party preference. Under the DNC rules, the State Party may determine presidential preference through a primary, at a Convention or in caucusses. The DNC does not mandate which of these systems must be used. However, participation in the process of determining preference as to the Democratic nominee must be limited to Democratic voters only who publicly declare their party preference and have that preference publicly recorded. If the State does not change its law so that only voters who publicly declare Democratic party preference and have that preference publicly recorded may participate in the binding Democratic primary, then the State Party must adopt and implement an alternative Party-run system which complies with the Rules.

19. Under *both* the Open Primary Law and the alternative caucus plan pursuant to the rules of the DNC: (1) the process for selecting the delegates is under the control and direction of the State Party; (2) only Democrats and those who subscribe to the general progressive principles of the State Party may participate in selecting delegates; and (3) a committed delegation results, *i.e.,* delegates to the National Convention are bound to support a particular candidate.

The parties stipulate to the authenticity of exhibits one through fourteen attached hereto.

(Signatures omitted.)

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Appellants

v.

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Appellees

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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I. THE STATE HAS MISSTATED THE ISSUE.

The State of Wisconsin has totally mischaracterized the questions presented by this appeal in its Motion to Dismiss or Affirm ("Motion"). According to the State, the issue is whether it may constitutionally force the Party to accept a private, rather than a public, declaration of support as the standard for participating in its candidate selection process. The State

implies that the only conflict between the statute and the Party's rule is whether Democrats declare their affiliation publicly or privately.[1]

While the question described by the State would be substantial enough to warrant this Court's attention, the State has nevertheless misstated the issue through its erroneous portrayal of the statute. No one even moderately familiar with nominating processes believes that an "open primary" law limits voting in a party primary to party adherents. The Wisconsin law is a classic "open primary" statute: anyone may vote in any party's primary without regard to party affiliation or adherence. And for years Republicans, independents, and other non-Democrats have crossed over to vote in the Wisconsin Democratic primary. Jurisdictional Statement at 17-18.[2] Further, nothing in the Wisconsin Court's decision would alter the "open" operation of the state's statute.

Yet, as noted in the Jurisdictional Statement, the Party's rule allows only publicly affiliated Democrats to participate in choosing the Democratic candidate. The rule screens out those whose interest in the Party's political values and electoral success is so slight, tenuous and/or fleeting that he or she refuses to stand up and be counted. The open primary statute clearly abrogates Rule 2A by requiring the Party to accept crossovers.

The State has tried to minimize the irreconcilable and material conflict between the open primary law and the rule by mischaracterizing the operation of its statute. Contrary to the State's view, the fundamental question presented by this appeal

---

[1] Because a voter may vote on only one party's ballot, the State claims that only Democrats are able to vote in the Democratic primary.

[2] Indeed, in the Wisconsin Supreme Court the State's Attorney General vigorously defended the "right" of independents and Republicans to vote in the Democratic primary. Jurisdictional Statement at 19.

is whether Wisconsin may, under the First and Fourteenth Amendments, require the Party to accept the influences of non-Democrats in its candidate selection processes.

II. TO ESTABLISH A BURDEN ON THE EXERCISE OF ITS RIGHTS, THE PARTY HAD NO OBLIGATION TO PROVE THAT IT HAD CHOSEN THE MOST EFFECTIVE MEANS FOR CONDUCTING ITS POLITICAL AFFAIRS.

The State's principal contention—that the Party failed to show a burden on the exercise of its rights—rests on a distorted view of the First Amendment. Apparently, in the State's view the First Amendment only affords the Democratic Party the right to advise the State of its objective and to try to prove to a state court that the means it chose for achieving the objective are sufficiently effective to warrant Constitutional protection. But, freedom of association would mean little if the First Amendment conferred no more than a right to prove to a state court that the party had made the most effective political choice.

In any event, the Party's choice was founded both on experience and study. Jurisdictional Statement at 5. From 1968 on the Party tried increasingly strong measures for eliminating the diluting influence of crossover voting.[3] After 1976 the Party adopted Rule 2A, based in part on studies of the Wisconsin experience.[4] Although the Party has no obligation in establishing a burden to show more than Wisconsin's direct infringement on the exercise of its rights, it had an ample factual basis for establishing Rule 2A.

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[3] *Mandate for Reform, A Report of the Commission on Party Structure and Delegate Selection* at 47 (1970); *Democrats All: A Report of The Commission on Delegate Selection and Party Structure* at 2, 9, 15 (1973); *Openness, Participation and Party Building: Reforms for a Stronger Democratic Party* at 68-70 (1978).

[4] See *Openness, Participation and Party Building: Reforms for a Stronger Democratic Party* at 68-70.

III. THIS COURT'S DECISION IN *MARCHIORO v. CHANEY* IS TOTALLY INAPPOSITE BECAUSE THERE THE CHALLENGED STATUTE IMPOSED NO BURDEN ON THE PARTY'S EXERCISE OF ITS RIGHTS.

The State's citation of *Marchioro v. Chaney*, ____U.S. ____, 99 S.Ct. 2243 (1979), is totally inapposite. In *Marchioro* the Court did not uphold, as the State contends, state regulation of political parties "in recognition of the critical role played by political parties in the process of selecting and electing candidates for state and national office". Motion at 7. On the contrary, the Court expressly noted that the question was not presented in *Marchioro*. *Id.* at 2247 and n.12.

In *Marchioro* the Washington state statute required the state party to have a central committee consisting of two persons from each county in the state. This committee would perform statutorily defined duties related to filling vacancies on tickets, providing for the nomination of electors and other similar functions. Those challenging the statute did not complain about the requirement that a state committee composed as prescribed perform the statutorily listed functions. They complained instead that the statute precluded the use of a more broadly based party institution to perform functions other than those prescribed in the statute—such as fund-raising. The Court found that the challengers had not shown a burden on their rights, because the party clearly could have assigned the non-statutorily prescribed duties to another, more broadly based body. The state party then, unobjectionably, could have left the statutorily prescribed duties to the statutorily composed committee. Therefore, there was no conflict between the statute and the state party's preferences for organizing itself.

In contrast, the Wisconsin statute interferes directly with a Party political preference of fundamental importance. *Cousins* v. *Wigoda*, 419 U.S. 477 (1975), is directly on point. Jurisdictional Statement at 10-13. If *Cousins* has any vitality at

all, it precludes a state from forcing a political party to allow non-adherents to influence its candidate selection. That is the fundamental constitutional question squarely presented in this case.

IV. CONCLUSION

For these reasons the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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REPLY TO APPELLANTS' SUPPLEMENTAL BRIEF

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Appellants mistakenly suggest the decision of the Wisconsin Supreme Court is contradicted by the decision of the United States District Court for the Western District of Michigan in Ferency v. Austin, No. G80-193 CAS (April 21, 1980).

Ferency is inapposite. The distinction between the statute at issue in Ferency and the instant case is fundamental. In Ferency, as in Cousins v. Wigoda, 419 U.S. 477 (1975) (direct voter selection of delegates), voters select the persons who choose the delegates who not only participate in the National Party Convention presidential nominee selection process, but also the entire range of internal party matters. Under Wisconsin law, the

voters determine only candidate proportional representation. The State Democratic Party selects the individual delegates. Thus, the Ferency decision concerns a situation different in kind.

Moreover, the portion of the Michigan law the court found constitutionally offensive was its failure to restrict voting in the Democratic primary to Democrats.

> It is entirely permissible and reasonable for the Democratic Party to decide that only Democrats should vote in primary elections designed to select delegates to a national convention. The Michigan statute does not permit that. For that reason, I find it to be unconstitutional as applied to the Democratic Party in this case.

(Slip. op., at 15-16.) The court noted that under Michigan law a Republican or a Democrat could vote in either the Republican or the Democratic primary. (Slip. op., at 2.) Had such "cross-over voting not been allowed, Michigan's statutory scheme might well have been constitutional." (Slip. op., at 15.)

In contrast to Michigan's law, Wisconsin provides that only Democrats may vote in the Democratic primary. The Wisconsin Legislature intended that "voters should vote only on the ballot of the party they claim as theirs and that they will not vote on the ballot of a party with which they do not identify." State ex rel. La Follette v. Democratic Party, 93 Wis. 2d 473, 504, 287 N.W.2d 519, 532 (1980). (A-Ap. 23a). In fact, the Legislature enabled voters to select an uninstructed delegation "'in order to reduce the temptation of cross-over voting.'" 93 Wis. 2d at 504-05, 287 N.W.2d at 533. (A-Ap. 23a).

Consequently, Ferency distinguished laws like Wisconsin's, which restrict voting in Democratic primaries to Democratic voters, saying they "might well be constitutional." (Slip. op., at 15.)

Further, for purposes of its analysis, the Wisconsin court said "we accept the National Party's assertion that it has a protected associational interest in ensuring that only Democratic voters participate in selecting the Democratic presidential candidate." 93 Wis. 2d at 499, 287 N.W.2d at 530. (A-Ap. 18a). It found, however, that upon analysis of the record, the National Party could not demonstrate that the claimed burden on these associational rights was other than "speculative, remote and minimal." 93 Wis. 2d at 511, 287 N.W.2d 519 (1980).

CONCLUSION

It is respectfully submitted that this Court should grant the motion to dismiss or affirm.

Dated at Madison, Wisconsin, this 17th day of June, 1980.

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QUESTION PRESENTED

Whether, in light of the First and Fourteenth Amendments to the U.S. Constitution, *Cousins v. Wigoda*, 419 U.S. 477 (1975), and other decisions of this Court, the State of Wisconsin's primary election statutes may constitutionally (1) force the National Democratic Party to permit Republicans and other non-Democrats to participate in the Party's presidential candidate selection processes; and (2) prohibit the Party from enforcing its rules for determining the qualifications of delegates to its National Convention.

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BRIEF FOR APPELLANTS

Under its rules the National Democratic Party allows only publicly declared Democrats to participate in its processes for selecting the Party's presidential candidate. In contrast, Wisconsin's open primary statute permits Republicans, independents, and other non-Democrats to vote in the Democratic presidential primary without regard to party affiliation. In the judgment on appeal, the Wisconsin Supreme Court ruled that the Democratic Party and its Convention could not refuse to seat the delegates from Wisconsin on the grounds that, as required by the

state's law, the results of the open primary controlled their votes for the Party's nominee.

The Wisconsin court's order violates the First and Fourteenth Amendments to the United States Constitution. It prohibits the Democratic Party from allowing only Democrats to participate in its candidate selection processes. It infringes on the rights of the Party and its adherents to establish and enforce qualifications for the delegates to its National Conventions.

OPINION BELOW

The opinion of the Wisconsin court, which is set forth in Appendix A of Appellants' Jurisdictional Statement (hereinafter cited as "J.S. App. A"), is reported at 93 Wis. 2d 473, 287 N.W.2d 519 (1980). It is the only opinion below, because the State of Wisconsin initiated this case as an original action before the Supreme Court of Wisconsin.

JURISDICTION

The Appellants invoke the jurisdiction of this Court under 28 U.S.C. § 1257(2). The Supreme Court of Wisconsin entered its judgment upholding the constitutionality of the open primary law on January 19, 1980. The National Democratic Party filed a Notice of Appeal in the Supreme Court of Wisconsin on March 13, 1980. J.S. App. A at 68a. This appeal was docketed in this Court within 90 days from the final judgment of the Wisconsin court. This Court noted probable jurisdiction on July 2, 1980. *Democratic Party of the United States et. al. v. Wisconsin ex rel. La Follette*, 100 S.Ct. 3054 (1980).[1]

[1] On the same day the Court stayed the judgment of the Wisconsin Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

The First and Fourteenth Amendments to the United States Constitution and relevant portions of the Delegate Selection Rules for the 1980 Democratic National Convention are set forth in Appendix B of Appellants' Jurisdictional Statement. The applicable Wisconsin primary election statutes, Wis. Stat. §§ 5.37(4); 5.60(8)(intro.),(c),(d); 8.12 (1977), are set forth in Appendix A of Appellants' Jurisdictional Statement, as an Appendix to the Wisconsin Supreme Court's opinion.

STATEMENT OF THE CASE

Rule 2A of the Democratic Party's Delegate Selection Rules limits participation in the delegate selection process to Democratic voters who are willing to affiliate publicly with the Party.[2] Under the Party's rules the delegate selection process includes any procedure by which delegates are bound to vote for the nomination of particular candidates. Democratic National Committee, Delegate Selection Rules for the 1980 Democratic National Convention, Rule 12(B), (D) (June 9, 1978) (hereinafter cited as "Delegate Selection Rules for the 1980 Democratic National Convention"), Appellant's Jurisdictional Statement, Appendix B (hereinafter cited as "J.S. App. B") at 70a-71a. In contrast, the Wisconsin open primary law allows non-Democrats—including Republicans, independents, and others—to vote in the Democratic primary without regard to party affiliation and without requiring

[2] Rule 2A provides in part:

> Participation in the delegate selection process in primaries or caucuses shall be restricted to Democratic voters only who publicly declare their party preference and have that preference publicly recorded.

a public declaration of party preference. The State's statute also provides that the open primary results must control the nominee preference votes of the delegates from Wisconsin to the national nominating convention. Wis. Stat. § 8.12(3)(b), (3)(c)5., J.S. App. A at 58a-59a. In the decision on appeal, the Wisconsin Supreme Court declared that the Party's National Convention may not disqualify delegates because the open primary results control their votes for the Party's nominee. J.S. App. A at 42a. The Wisconsin court's judgment and the state statute thus would preclude the Party from enforcing its rule on who may participate in selecting the Democratic presidential candidate.

A. The Party's Rule: Its Evolution and Purpose

1. *The 1968 Convention and the genesis of the rule*

Rule 2A is an integral part of the National Party's twelve-year effort to reform its processes for choosing presidential candidates. In the wake of the disruption and violence at the 1968 Democratic National Convention, the National Party determined to study and reform its nominating procedures and party structure. The Convention, the highest authority within the Democratic Party, directed the Democratic National Committee (the "DNC") to establish the Commission on Party Structure and Delegate Selection (the "McGovern/Fraser Commission").[3] The Commission's report, issued in 1970,[4] identi-

[3] The Commission had an important precursor, the Special Equal Rights Committee, created by the 1964 Convention. The Commission was responsible for developing and policing rules forbidding racial discrimination at the 1968 Convention. Among its guidelines was a request that state parties send delegations broadly representative of the Democrats of that state.

[4] Commission on Party Structure and Delegate Selection, *Mandate for Reform: A Report of the Commission on Party*

(*footnote continues*)

fied the problem that became the major target of the Party's reform efforts: the Party's Convention had been unrepresentative of rank and file Democrats as to both demographics (blacks, other minority groups, women, and youth) and candidate preference. The perception of a party impervious to its rank and file, the Commission said, threatened the Party's future. *Mandate for Reform* [Record (hereinafter cited as "Rec.") at 200] at 9. The challenge was "to find methods which would guarantee every American *who claims a stake in the Democratic Party* the opportunity to make his judgment felt in the presidential nominating process." *Id.* at 8 (emphasis added).

The McGovern/Fraser Commission adopted guidelines to eliminate state party practices that (1) limited the access of Democratic rank and file to the candidate selection processes and (2) would dilute the influence of each Democrat taking advantage of the expanded opportunities to participate. *Id.* at 12. For example, the delegates ultimately chosen and their apportionment to particular candidates had to reflect fairly the candidate preferences of Democrats participating at all levels of the process. *Id.* at 44.[5]

(*footnote continued*)

Structure and Delegate Selection to the Democratic National Committee (April, 1970) (hereinafter cited as "*Mandate for Reform*") [Rec. 200].

[5] Other measures the Commission recommended included: (a) abolishing the unit rule at any stage of the delegate selection process so that a majority of a meeting or delegation no longer could bind a dissenting minority to vote in accordance with the wishes of the majority; (b) requiring adequate public notice of times and places of meetings related to the delegate selection process; and (c) requiring information on ballots as to the presidential preference of candidates or slates of delegates. *Id.* at 44-46.

While seeking to open the Party's nominating processes to all persons who wished to be Democrats, the Commission was concerned that "a full opportunity for all Democrats to participate is diluted if members of other political parties are allowed to participate in the selection of delegates to the Democratic National Convention." *Id.* at 47. It urged state parties to limit participation in delegate selection processes to Democrats. Limiting participation to Democratic voters was thus an integral feature of the effort to open the nominating processes to fully effective participation by rank and file Democrats.

2. ***Further development of the rule: The Mikulski Commission, the Party's Charter, and the 1976 Delegate Selection Rules***

In 1972 the Democratic National Convention created a new commission to review and revise the guidelines it had used. The Commission on Delegate Selection and Party Structure (the "Mikulski Commission") continued the effort to ensure that the influences of all Democrats were fully felt in the delegate selection and nominating processes. *See* Commission on Delegate Selection and Party Structure, *Democrats All: A Report of the Commission on Delegate Selection and Party Structure* (December 6, 1973) (report to Democratic National Committee), Joint Appendix (hereinafter cited as "J. App.") at 30.[6] As part of that effort, the Commission tried to strengthen the rules that would allow only Democrats to participate in the Party's candidate selection processes. Moving beyond the hortatory language of the McGovern/Fraser Commission, the Mikulski Commission proposed rules that directed state parties to take steps to restrict participation in the delegate selection process to Democratic voters only. *Id.*

[6] For example, it retained rules requiring that the delegates fairly reflect the expressed preferences of Democratic voters participating in the selection process. *Id.* at 2, J. App. at 31-32.

at 2, 15. The DNC incorporated these recommendations into the Delegate Selection Rules for the 1976 Convention, Democratic National Committee, Delegate Selection Rules for the 1976 Democratic National Convention (March 1, 1975) (hereinafter cited as "Delegate Selection Rules for the 1976 Democratic National Convention"). J. App. at 36.

In 1974 the National Party adopted its Charter and By-Laws. Consistent with the themes of the Party's reform efforts, the Charter establishes the following qualifications for future delegates to the Party's national conventions:

> The National Convention shall be composed of delegates who are chosen through processes which (i) assure all Democratic voters full, timely and equal opportunity to participate and include affirmative action toward that end, (ii) assure that delegations fairly reflect the division of preferences expressed by those who participate in the presidential nominating process, . . . [and] (v) restrict participation to Democrats only. . . .

Democratic National Committee, Charter of the Democratic Party of the United States, Article Two, Section 4. Exhibit 1 [Rec. 199] at 2-3.

In 1976, Rule 2A of the Delegate Selection Rules took its present form. Consistent with the Charter, it restricted participation in the delegate selection process in primaries or caucuses to "Democratic voters only who publicly declare their party preference and have that preference publicly recorded." Delegate Selection Rules for the 1976 Democratic National Convention, Rule 2A, J. App. at 36. Although the text of the original Rule 2A was the same as the 1980 rule, a state party could obtain an exemption from it. Rule 20 authorized exemptions from any rule that was inconsistent with state law, where the state party was

unable to secure changes in the law. See discussion of Rule 20 *infra* at 9 n.9.

3. *The Winograd Commission and the 1980 Rule*

In late 1975 the Party established another commission to study its nominating processes for 1980 and after, the Commission on Presidential Nomination and Party Structure (the "Winograd Commission"). In its report, *Openness, Participation and Party Building: Reforms for a Stronger Democratic Party* (February 17, 1978) (hereinafter cited as "*Openness, Participation and Party Building*"), J. App. at 37, the Winograd Commission specifically focused attention on the question "[w]ho should participate in selecting the presidential nominee of the Party?" *Id.* at 7, J. App. at 46.

The Winograd Commission identified problems related to open or crossover primaries as particular weaknesses in the rules.[7] Its focus on the dilution of each Democrat's influence caused by crossovers arose, in part, from a study of voting in Wisconsin's open primary. This study, discussed *infra* at 30-31, found that in Wisconsin Democratic primaries from 1964 through 1972: crossovers made up between 26% and 34% of the participants, their voting patterns were significantly different from those of primary voters who identified themselves as Democrats, and they had a significant impact on the composition of the delegation from Wisconsin.[8]

Based on such studies and the unsatisfactory experience of prior years, the Winograd Commission recom-

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[7] As used in this Brief, an open or crossover primary is a primary which permits nonadherents of a party to vote in that party's primary. The nonadherents "crossing over" may be adherents of other parties or they may be independents.

[8] Adamany, *Cross-over Voting and the Democratic Party's Reform Rules*, 70 Am. Pol. Sci. Rev. 536, 538-39 (1976).

mended further strengthening of the Party's rules against crossover voting. *Openness, Participation and Party Building* at 68, J. App. at 71. It proposed revising Rule 2 because continued crossover voting "could result in a convention delegation which did not fairly reflect the division of preferences among Democratic identifiers in the electorate." *Id.* It retained the text of Rule 2A, quoted *supra* at 3 n.2, but added Rule 2B which prohibited exemptions from the rule. *Id.* at 69, J. App. at 73; Delegate Selection Rules for the 1980 Democratic National Convention Rule 2B, J.S. App. B at 69a. Rule 2A was the only rule from which the 1980 rules permitted no exemptions.[9]

B. The Wisconsin Open Primary Law and the Proceedings Below

As noted, the Wisconsin primary election statute allows any voter to vote in the Democratic primary without regard to party affiliation. J.S. App. A at 2a, 23a-24a. At the open primary each voter is given the ballots of all parties. Wis. Stat. § 5.60(8), J.S. App. A at 47a. While each voter may vote on only one ballot, the voter need not publicly indicate which party's ballot he marked. *Id.* Republicans, independents and other non-Democrats are allowed to vote in the Democratic primary and, hence, to

[9] Rule 20 permits exemptions from other rules where state parties are unable to comply with the Delegate Selection Rules because the rules are in conflict with existing state law. Under Rule 20 state parties must take "provable positive steps to achieve legislative changes to bring the state law into compliance with the provisions of these rules." If a state party takes such provable positive steps but is unable to obtain the necessary legislative changes, the state party may be eligible for a Rule 20 exemption. In 1976, at the eleventh hour, the Wisconsin State Party obtained such an exemption from the 1976 version of Rule 2A.

influence the selection of the Party's presidential nominee. Although the delegates to the Democratic National Convention are chosen later at caucuses attended by Democrats, the statute requires that the votes of these delegates must be committed to presidential candidates in proportion to the votes cast in the open primary. Wis. Stat. § 8.12(3)(b); Stipulations 18, 19, J. App. at 26-27.

On May 11, 1979, the Democratic Party of Wisconsin transmitted the Wisconsin Delegate Selection Plan of 1980 to the Party's Compliance Review Commission (the "CRC").[10] Stipulation 13, J. App. at 25. The plan provided that delegates shall be allotted to candidates in proportion to the votes cast for the candidates in the State's "open" primary. The CRC found that this method violated Rule 2A and, on July 19, 1979, advised the Wisconsin Party that its Plan violated the Rules and the Call to the 1980 Convention.[11] Stipulations 14, 15, J. App. at 25. Compliance with Rule 2A was a condition to participation at the National Convention. Stipulation 11, J. App. at 25.

On August 29, 1979, the State of Wisconsin asked the Wisconsin Supreme Court for leave to commence an original action to enforce its primary law against the Democratic Party. The State sought declaratory and injunctive relief, asking the court in part (1) to enjoin the National and Wisconsin Parties from implementing an alternate delegate selection system limited to publicly declared Democrats, and (2) to enjoin the National Party

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[10] The CRC, which is a special party commission established under the Rules, reviews delegate selection plans submitted by state parties and approves or requires changes in them. Stipulation 12, J. App. at 25.

[11] The Call formally establishes the date of the Convention, the qualifications for delegates, the Convention's procedures, and other rules essential to the conduct of the Convention. Stipulation 10, J. App. at 24.

from refusing to seat Wisconsin delegates at the Convention solely because they were bound by the results of the State's open primary.

After briefing and oral argument, the Wisconsin Supreme Court declared that: the Wisconsin primary election statutes are constitutional and binding on the National Party; the vote in the primary shall determine the apportionment among candidates of delegates to the Democratic National Convention from Wisconsin; and the National Party shall not disqualify any delegates solely because they are bound by the primary results. J.S. App. A at 42a.

The Wisconsin court assumed that the National Party has a constitutionally protected interest in ensuring that only Democrats participate in the selection of the Democratic candidate. It reasoned, however, that the primary election statute did not substantially burden that interest. In the court's view, the method the Party had chosen to reach its objective—requiring public affiliation—was not "a necessary and effective way to prevent Republicans, adherents of other parties, and independents from voting on the Democratic Party ballot." J.S. App. A at 27a. Because, the court asserted, the primary election statute permits voting in only one party's primary, it furthers the objective of Rule 2A as effectively as the Party's rule. The statute, it said, therefore imposes no burden on the Party's protected interests. The court also said that, even if a burden exists, Wisconsin has a compelling interest in enforcing its statute. J.S. App. A at 36a, 42a.

The Attorney General of Wisconsin indicated that he would seek to enjoin the Democratic Party from implementing measures to select delegates in compliance with Rule 2A. *Wisconsin High Court Rules, Wis. State J.*, January 20, 1980, at 1, col. 1; 2, col. 5. Wisconsin held its

primary on April 1, 1980, in the manner specified by the election statute. Subsequently, the Wisconsin state party chose delegates to the 1980 Democratic National Convention in compliance with the Wisconsin court's order.

On July 20, 1980, the Credentials Committee of the 1980 Democratic National Convention decided to seat the delegates from Wisconsin, despite the fact they were selected in a manner which violated Rule 2A. Although the Committee recognized that this Court's stay left it free to refuse to seat those delegates, it decided—at that late date and in the absence of a challenge—to seat the Wisconsin delegates at the 1980 Convention.[12]

SUMMARY OF ARGUMENT

(1) First and Fourteenth Amendment protection against state infringement of associational rights applies with special force where political parties are selecting

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[12] The passage of the 1980 Convention and the Wisconsin delegates' participation do not moot this case. The burdens which Wisconsin's open primary law places on the Democratic Party's associational activity will persist as long as Wisconsin maintains its present statute. As noted, the Party's Charter requires that participation in the nomination processes be limited to Democrats. Thus, the coercion on the party by the open primary statute "remains and controls future elections." *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969). Moreover, the time required for full litigation of the issues will be far too short to allow a full judicial resolution prior to the next Convention, if the litigation begins anew in 1983 or 1984 only after delegate selection plans are submitted and rejected. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). The problem, therefore, falls within a class of cases or controversies "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911); *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972).

their candidates. A party's candidate selection process represents an organized attempt of like-minded individuals to shape the policies, programs, and personnel of the government itself. Moreover, when choosing candidates, political parties make decisions reconciling the varied interests of their adherents. These decisions reflect political judgments and compromises that are easily distorted by government intrusion.

The order of the Wisconsin court and the statute interfere directly with the Democratic Party's candidate selection process, in violation of the First and Fourteenth Amendments. The Wisconsin court's order would force the National Democratic Party to accept the participation of Republicans and other non-Democrats in selecting its candidates. It would preclude the Party from adopting procedures it believes are necessary to assure that only Democrats participate in selecting the Democratic presidential nominee. It would also interfere directly with the ability of the Party and its Convention to establish and pass on the qualifications of delegates.

(2) This Court's decision in *Cousins v. Wigoda*, 419 U.S. 477 (1975), is dispositive here. In *Cousins*, this Court held that state interests virtually identical to those asserted by Wisconsin could not be sufficiently compelling to justify interfering with a political party's nominee selection process. The national conventions, the Court emphasized in *Cousins*, not the states, have ultimate authority for selecting the parties' presidential nominees. If qualifications for delegates to national party nominating conventions could be imposed by state law, then each of the 50 states could establish delegate qualifications wholly without regard to party policy—a result this Court found would be intolerable. *Id.* at 490.

The Wisconsin Supreme Court's opinion offers no meaningful distinctions of *Cousins v. Wigoda*. As in

Cousins, state interference with a party's selection of its presidential candidate is the crucial issue here. If this case differs from *Cousins*, it is only because the Wisconsin court's order constitutes a more severe infringement on the party's rights. In *Cousins* the Illinois court had enjoined delegates from participating in the Convention. In the order on appeal, the Wisconsin court effectively ordered the National Democratic Party and its Convention to seat delegates chosen in violation of the Party's rules. All nine Justices in *Cousins* agreed that an order affirmatively forcing the party to seat delegates against the Convention's will would be unconstitutional.

(3) The Wisconsin court's suggestion that the state's open primary law imposes no burden on the Party's exercise of its rights misconceives the function of the Party's rule and ignores the historic operation of the law. The Wisconsin Supreme Court tried to avoid the effect of *Cousins v. Wigoda* by asserting that the statutory procedures, which permit an individual to vote in only one party's primary, require affiliation. The only difference, the court says, is that the affiliation is private rather than public as Rule 2A requires.

Contrary to the court's assertion, however, the open primary statute does not limit voting in the Democratic primary to Democrats. The essence of an open primary is that it permits crossover voting. The statute on its face allows crossover voting. In fact, Republicans, independents, and other non-Democrats have voted for years in the Wisconsin Democratic primary. A quantitative study relied upon by the Party's Winograd Commission, which recommended strengthening Rule 2A, showed that (a) crossovers participated in Wisconsin Democratic primaries in 1964, 1968, and 1972; (b) crossovers' presidential candidate preferences were different from those who identified themselves as Democrats; and (c) the crossover vote would alter the composition of the Wisconsin delegation of the

national convention. Additionally, Wisconsin's Attorney General recognized the actual operation of the statute and contended that it intentionally allows crossover voting. The premise of the Wisconsin court's theory—that the statute does not burden the Party's exercise of its rights —has no foundation in the statute, its actual operation, or the Party's experience.

Moreover, Rule 2A establishes a standard for participation that the court's order abrogates. The Party allows only publicly declared Democrats to participate in its candidate selection processes. The statute and the Wisconsin court's order would preclude the party from enforcing that standard. That fact alone constitutes a substantial infringement on the Party's exercise of associational rights. While there may be various ways for a political party to govern itself, the party's choice of means has the protection of the Constitution. The essence of First and Fourteenth Amendment rights is that a state not be able to impose a contrary judgment about those choices on a political party. *Healy v. James*, 408 U.S. 169 (1972). The burden imposed by the statute and the Wisconsin court's order is palpable and severe.

(4) Wisconsin has no interest sufficiently compelling to justify the burden the statute places on the Party's ability to determine the qualifications of delegates to its own Convention. The Wisconsin court had no basis for the assertion that there is wider participation in an open primary than in a primary limited to publicly affiliated voters. It had no evidence of voter harassment in the numerous states (such as New York) where state statutes require affiliation through registration on public rolls as a condition for voting in the primary. Further, the Wisconsin court's claim that the open primary statute preserves its citizens' "fundamental right to vote" in the presidential primary assumes erroneously that Republicans and

other non-Democrats have a "right" to influence the choice of the Democratic candidate.

(5) Finally, even if any of the interests listed by the Wisconsin court were sufficiently compelling, the Wisconsin open primary statute fails to employ the least restrictive means available to achieve the State's goals.

ARGUMENT

I. UNDER THE FIRST AND FOURTEENTH AMENDMENTS, *COUSINS v. WIGODA*, AND NUMEROUS OTHER DECISIONS OF THIS COURT, THE STATE OF WISCONSIN MAY NOT FORCE THE NATIONAL DEMOCRATIC PARTY TO PERMIT OTHER THAN PUBLICLY DECLARED DEMOCRATS TO PARTICIPATE IN SELECTING ITS PRESIDENTIAL NOMINEE OR OTHERWISE TO ABANDON ITS RULES FOR SELECTING DELEGATES TO THE NATIONAL CONVENTION.

A. The Wisconsin Court's Judgment Unconstitutionally Interferes With The Party's Processes For Selecting Its Presidential Candidate.

The National Democratic Party and its adherents enjoy a fundamental right of free political association protected by the First and Fourteenth Amendments to the Constitution of the United States of America. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). As this Court has reiterated many times, associational activity for political purposes lies at the "core

of our electoral process and of the First Amendment freedoms." *See, e.g., Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

First and Fourteenth Amendment protection against state interference in political activity takes on even greater importance in the context of political parties selecting their candidates. For it is principally through election of their candidates that associations of like-minded individuals seek to shape the policies, programs, and personnel of the government itself. Protection of the candidate selection process from state intrusion is crucial in a free society, because it is the means by which the Party attempts to implement its adherents' views through the control of government. *See Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567, 585 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976).

Moreover, the process of winnowing out contenders to select the Party's candidate is particularly susceptible to distortion by state intrusion. The decisions parties make in accommodating the varied interests of their adherents and in trying to achieve their goals reflect subtle political judgments and delicate balances of competing views. A state law which interferes with the freedom of a national political party to establish delegate selection rules and of its convention to pass on the credentials of its delegates is "as direct and severe an infringement of the right of association as can be conceived." *Cousins v. Wigoda*, 419 U.S. 477, 491-92 (1975) (Rehnquist, J., concurring).

The First and Fourteenth Amendments to the Constitution and this Court's decision in *Cousins v. Wigoda* thus bar the State of Wisconsin from forcing the Democratic Party to accept the influence of Republicans and other crossovers in selecting its presidential nominee. Under settled constitutional doctrine, a state may interfere with the Party's exercise of its associational rights only where a compelling state interest justifies the in-

fringement. In *Cousins*, which Appellants believe is dispositive here, this Court held that a state's interest—one very similar to the interest asserted by Wisconsin here—could not be sufficiently compelling to justify so serious an infringement on the Party's First and Fourteenth Amendment rights.

B. This Court's Decision In *Cousins v. Wigoda* Is Dispositive.

In *Cousins*, this Court reversed the decision of an Illinois state court enjoining the seating of delegates selected in accordance with Party rules, rather than those selected in the Illinois primary election under state law. In the 1972 Illinois primary, the voters of Cook County elected a slate of delegates to the 1972 Convention which had been selected under procedures violating the Party's slatemaking guidelines.[13] The Party's Credentials Committee refused to seat the elected delegates and replaced them with a delegation chosen in post-primary caucuses that complied with the Party's rules. Shortly before the opening of the Convention, the Illinois Appellate Court affirmed an order of the Circuit Court of Cook County enjoining the delegates chosen in the caucuses from sitting as delegates to the Convention. 419 U.S. at 478-84. The Illinois court reasoned that "the effective right to participate in primaries is superior to whatever other interest the party itself might wish to protect." *Wigoda v. Cousins*, 14 Ill. App. 3d 460, 477, 302 N.W.2d 614, 629 (1973).

This Court reversed, holding that Illinois' interest in protecting the integrity of its electoral process could not

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[13] Under the Party's rules, state parties presenting slates to caucuses, conventions, or primary voters had to adopt rules which assured that the processes for selecting the slates were fair and open.

be sufficiently compelling to justify so serious an infringement on the Party's conduct of its candidate selection process. The state's interest, "the protection of votes cast at the primary from the impairment that would result from stripping the respondents of their elected-delegate status," 419 U.S. at 488, was insufficient to justify the injunction's infringement on First Amendment rights. *Id.* at 491.

The Court also said that the state's interest could not be sufficiently compelling to justify so serious an infringement on the Party's conduct of the process of choosing its national candidates: "The States themselves have no constitutionally mandated role in the great task of the selection of Presidential and Vice-Presidential candidates." *Id.* at 489-90 (footnote omitted). The national conventions, not the states, have the ultimate authority for that task. Noting the danger of permitting each of the fifty states to impose its own views as to what a party's delegate selection process should be, the Court said:

> If the qualifications and eligibility of delegates to National Political Party Conventions were left to state law "each of the fifty states could establish the qualifications of its delegates to the various party conventions without regard to party policy, an obviously intolerable result." *Wigoda v. Cousins*, 342 F. Supp. 82, 86 (N.D. Ill. 1972).

Id. at 490.[14]

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[14] As noted in Appellants' Jurisdictional Statement at 8 n.9, conflict between Rule 2A and state primary election laws spawned litigation under Montana and Michigan statutes. *Jordan v. Democratic Party of the United States of America*, No. 80-

(*footnote continues*)

The *Cousins* holding applies with special force here, because of the severity of the infringement on the Party's rights. Political parties must be able to protect themselves "from intrusion by those with adverse political principles." *Ray v. Blair*, 343 U.S. 214, 221-22 (1952).[15] In *Rosario v. Rockefeller*, 410 U.S. 752 (1973), this Court upheld the constitutionality of New York's party enrollment requirement for primary voters. The court of appeals, whose decision this Court affirmed, recognized that "the efficacy of the party system in the democratic process — its usefulness in providing a unity of divergent factions in an alliance for power — would be seriously impaired were members of one party entitled to interfere and participate in the opposite party's affairs." *Rosario v. Rockefeller*, 458 F.2d 649, 652 (2d. Cir. 1972), *aff'd*, 410 U.S. 752 (1973). *See Kusper v. Pontikes*, 414 U.S. 51 (1973).[16]

(*footnote continued*)
0617 (D.D.C., filed Mar. 10, 1980); *Ferency v. Austin*, No. G80-193ca(5) (W.D. Mich., filed Mar. 27, 1980). The complaint in *Jordan* was recently dismissed without prejudice. The decision of the district court in *Ferency*, holding that the Michigan statute cannot be enforced against the Party, is presently on appeal to the U.S. Court of Appeals for the Sixth Circuit.

[15] "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." L. Tribe, *American Constitutional Law* 791 (1978) (footnote omitted).

[16] Although *Rosario* dealt with "raiding," it applies with full force to measures designed to protect against crossover voting where raiding is not the only concern. The Party's efficacy as a political organization is impaired both by raiding and by crossover voting. The injury suffered by the Party is little affected by the motive of the non-Democratic voter. In both cases the injury results because both the raider and the crossover vote differently than rank and file Democrats. *See* discussion *infra* at 30-31.

C. The Wisconsin Supreme Court's Opinion Fails To Offer Any Meaningful Distinction Of *Cousins v. Wigoda.*

The Wisconsin Supreme Court tried to distinguish *Cousins* on the ground that this case allegedly "does not arise 'in the context of the selection of delegations to the National Party Convention' or in the context of determining 'intraparty disputes as to which delegates [should] be seated'." J.S. App. A at 42a. The statement totally ignores the Wisconsin court's own order, which would have precluded the Convention from disqualifying certain delegates absent this Court's stay.

Delegate qualifications are directly involved. The procedures for determining which candidates the delegates are bound to support are crucial to the delegates' qualifications under the Party's rules. The rules on delegate qualifications require that delegates be bound to vote for candidates at the Convention by processes in which only publicly affiliated Democrats participated.[17] The rules apply only to processes that bind delegates to vote for particular candidates, because their purpose is to establish procedures for selecting the Party's candidate. If the rules controlled nothing more than the selection of delegates bound to cast votes predetermined by another process, they would hardly be worth litigating.

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[17] The "Qualifications of State Delegations" established in the Call explicitly incorporate the Delegate Selection Rules, which provide that (1) a primary that binds delegates to the preferences of the primary voters is a part of the delegate selection process, (2) only publicly declared Democrats may participate in the process, and (3) the preferences of the Democrats participating must be fairly reflected in delegate strength. Democratic National Committee, Final Call for the 1980 Democratic National Convention at 3-9 (May 25, 1979), Exhibit 7 [Rec. 205]; and Delegate Selection Rules for the 1980 Democratic National Convention, Rules 2 and 12.

Cousins also involved the Party's processes for selecting delegates who were bound to vote for particular candidates. Under the Illinois statute, delegates were committed to supporting particular candidates; the primary voters expressed their candidate preferences by voting for committed delegates. Ill. Rev. Stat. ch. 46, § 7-11 (1975). The Wisconsin open primary similarly determines the candidates whom the delegates must support, even though voters do not elect the delegates themselves. State interference with the procedures for selecting the Party's presidential candidate was the crucial issue in *Cousins* and is the crucial issue here.[18]

If this case differs from *Cousins*, it is only because the Wisconsin court's order is more intrusive than the Illinois court order at issue there. The Illinois court had enjoined the delegates from participation in the Convention. The Wisconsin court effectively ordered the Democratic Convention to seat delegates chosen in violation of the Party's rules. All nine Justices in *Cousins* agreed that a state could not constitutionally compel the convention to seat delegates against its will. *See* 419 U.S. at 488; *id.* at 492 (Rehnquist, J., concurring); *id.* at 496 (Powell, J., concurring in part and dissenting in part).

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[18] In fact, the controversy over whether to seat the Cousins or Wigoda delegates bore directly upon the outcome of the Party's selection of its presidential candidate. *See* Note, *Presidential Nominating Conventions: Party Rules, State Law, and the Constitution*, 62 Geo. L.J. 1621, 1629 n.36 (1974). The dispute there also would have meant little if candidate selection were not involved.

II. CONTRARY TO THE WISCONSIN COURT'S OPINION, THE OPEN PRIMARY LAW IMPOSES A SUBSTANTIAL BURDEN ON THE NATIONAL DEMOCRATIC PARTY'S EXERCISE OF ITS FIRST AND FOURTEENTH AMENDMENT RIGHTS.

The Wisconsin Supreme Court tried to avoid the effect of *Cousins v. Wigoda* by concluding that the open primary law does not impose a significant burden on the National Party's rights. It found that the statute imposed no burden on the Party because, it said, the statutory procedures screen out nonadherents as effectively as Rule 2A. J.S. App. A at 27a. It also found no reason to believe that crossover voting by Republicans, independents, and other nonadherents would impair the Party's processes for picking its candidates and conducting its affairs. The Wisconsin court not only misconceived the function of Rule 2A; its factual assertions are incorrect.

A. The Open Primary Law Abridges The Party's Standard For Participation In Its Candidate Selection Processes.

Rule 2A establishes a standard for participation in the process of selecting delegates to the 1980 Democratic National Convention. Only those willing to affiliate publicly with the Party may influence the Party's choice of its candidates and the other decisions before the Convention. Wisconsin's primary election statute precludes the National Democratic Party from enforcing Rule 2A.

The Wisconsin court tried to portray the open primary law as being equally as effective as Rule 2A in limiting participation in the nominating process to Democrats. Because the primary voter must vote on only one party's ballot, he or she effectively makes a declaration of affiliation with the Democratic Party for purposes of the primary, albeit an undisclosed one, the court said. Yet,

characterizing an "open primary" as one which limits voting in the Democratic primary to Democrats, as the court did, is a patently false premise. The essence of an open primary is that individuals vote in any party primary, regardless of party affiliation or avowed independence.

But, even if one could reasonably characterize Wisconsin's statute as providing for a "Democrats only" primary, it nonetheless still prevents the Democratic Party from allowing only publicly declared Democrats to participate in selecting the Party's candidates. In Rule 2A, the Party has made a conscious choice (based on experience with weaker rules) to use public affiliation to help limit participation in its candidate selection process to those who share the Party's political values and desires for political success. The rule screens out those whose affiliation is so slight, tenuous, or fleeting that they refuse to stand up and be counted.[19] Indeed, state statutes

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[19] The rule not only tries to ensure that the outcome of the process is not distorted by nonadherents, but also to build a more responsible party. An essential attribute of an effective party is that its adherents share a commitment to a network of overlapping and sometimes conflicting goals. This shared commitment is a party's essential impetus toward consensus and stability. D. Ippolito & T. Walker, *Political Parties, Interest Groups and Public Policy: Group Influence in American Politics* 4-5 (1980); F. Sorauf, *Party Politics in America* 13-14, 15-17 (1980); H. Bone, *American Politics and the Party System* 11-16 (1971).

As one commentator has said:

> [I]t is impossible to develop party responsibility if nominations may be controlled by those with no continuing allegiance to the party.... The closed primary deserves preference because it is more readily compatible with the development of a responsible party system.

Committee on Political Parties, *Toward a More Responsible Two Party System*, 64 Am. Pol. Sci. Rev. 1, 71-72 (Supp. No. 3, pt. 2) (1950) (emphasis omitted).

requiring public party enrollment for voting in primaries serve the same objectives. *Rosario v. Rockefeller*, 410 U.S. 752 (1973); *Kusper v. Pontikes*, 414 U.S. 51 (1973).

Thus, even if the Wisconsin court's view that the open primary statute actually requires affiliation to vote in a party's primary were plausible, the state would still be unconstitutionally substituting its own judgment for the Party's as to the standard for participation in selecting its candidate. An essential element of a political party's First and Fourteenth Amendment rights must include the freedom to organize and direct the party so as to be effective in fostering its goals. *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567, 585 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976). Time after time the courts have sustained a party's right to regulate its internal affairs regarding membership, affiliation, and representation in party decisionmaking. *E.g., Cousins v. Wigoda*, 419 U.S. 477 (1975); *Ray v. Blair*, 343 U.S. 214 (1952); *Ripon Society, Inc. v. National Republican Party*, 525 F.2d at 585; *Irish v. Democratic-Farmer-Labor Party of Minnesota*, 399 F.2d 119 (8th Cir. 1968).

As noted, the decisions parties make in conducting their affairs often reflect complex and subtle political judgments. There are virtually no standards by which legislatures or judges can determine with certainty the political effectiveness of a particular choice of means to achieve a concededly valid objective. There may be room for disagreement, but "a party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests, deserves the *protection* of the Constitution. . . ." *Ripon Society, Inc. v. National Republican Party*, 525 F.2d at 585 (emphasis in original). As the court said in *Ripon*, "[i]t is the essence of the First Amendment rights, which the parties exercise, that they may make their own

contrary (and rational) judgments without interference from the courts." *Id.* at 588.

This Court has repeatedly stated that the exercise of First Amendment rights may not be abridged merely because there may be other means of exercising those rights. In *Spence v. Washington*, 418 U.S. 405 (1974), the state supreme court had found "the inhibition on the appellant's freedom of expression 'miniscule and trifling' because there [were] 'thousands of other means available to [him] for the dissemination of his personal views." *Id.* at 411 n.4 (citation omitted). This Court rejected that view summarily, observing that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Id.* (quoting *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939)). *Accord, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n.15 (1976); *Healy v. James*, 408 U.S. 169 (1972).

B. Even If The State Could Substitute Its Judgment For The Party's, The Wisconsin Court Erred In Concluding That The Open Primary Law And Rule 2A Are Equally Effective In Precluding Non-Democrats From Influencing Selection Of The Democratic Candidate.

Even if it were proper for the Wisconsin Supreme Court to assess the relative effectiveness of the open primary law and Rule 2A in screening out non-Democrats, the court had no support for the finding that both limit participation equally as well. The parties submitted the case on stipulated facts that did not address that question at all. While the Wisconsin court tried to build a case from extra-record secondary sources, the secondary materials are in conflict, at least, and probably to the contrary.

A major quantitative study, relied on by the Winograd Commission, proved what most knew anyway: Republicans and other non-Democrats have "crossed over" to vote heavily in the Wisconsin Democratic primary for years. They also have a significant impact on the apportionment of the Wisconsin delegation's votes for candidates. Adamany, *Cross-Over Voting and the Democratic Party's Reform Rules*, 70 Am. Pol. Sci. Rev. 536, 540 (1976).

In 1964, crossovers made up 26% of the participants in the Wisconsin Democratic primary. In that primary, 7% of the Democratic identifiers voted for Governor Wallace, but 62% of the crossovers voted for him. Three-quarters of Governor Wallace's support in the Democratic primary came from crossover voters. *Id.* The distribution of the preferences of those who identified themselves as Democrats and crossovers were obviously quite different.

In 1968 crossovers made up 28% of the participants in the Democratic primary. Forty-eight percent of the Democratic identifiers voted for Senator McCarthy, while 39% voted for President Johnson. Of the crossovers, however, 70% voted for Senator McCarthy, while only 14% voted for President Johnson. Participation of crossovers increased by 2 1/2 times Senator McCarthy's margin of victory over President Johnson in Wisconsin. *Id.* at 539.

In 1972, crossovers made up 34% of the participants. Fifty-one percent of the Democratic identifiers voted for Senator McGovern while only 7% voted for Governor Wallace. Of the crossovers, however, only 33% voted for Senator McGovern, while 29% voted for Governor Wallace. The study figures indicate that two-thirds of Governor Wallace's support in the Democratic primary came from crossover voters. *Id.* The study found that "the participation of crossover voters will . . . alter the composition of national convention delegations." *Id.* at 540. As the

Winograd Commission concluded, crossovers distort the results of the process.

Late in its opinion the Wisconsin court acknowledged the well-known fact that Republicans and independents have voted in Wisconsin Democratic primaries. J.S. App. A at 25a. The Wisconsin court did not deny that the primary statute permits Republicans and non-Democrats to vote in the Democratic primary; nothing in the statute itself actually prohibits crossovers. The Wisconsin court's allusion to a statement of legislative intent is not to the contrary.[20] The generalized statement of legislative intent has never prevented Republicans from voting in the Democratic primary or vice versa.

Finally, Wisconsin's Attorney General took a more realistic view of the operation of the statute. He argued below that the state statute intentionally permits Republicans and other non-Democrats to participate in selecting the Democratic nominee. He contended that failure to uphold the open primary law over Rule 2A would frustrate the statute's policy of permitting any person to vote in any party's primary regardless of party allegiance. Memorandum in Support of Petition for Leave to Commence Original Action [Rec. 8] at 3. In the State's brief to the Wisconsin court he said that the statute encourages the exercise of the "associational freedoms" of independents and Republicans who wish to vote in the Democratic primary in a particular year. Brief and Appendix of Petitioner, J. App. at 80.

In sum, the Wisconsin Attorney General's view of the statute's intention, the court's recognition of its oper-

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[20] The Wisconsin court asserts that the "legislature has established the presidential preference primary to provide the opportunity for 'the voters of this state . . . to express their preference for the person to be the presidential candidate *of their party.*' Sec. 8.12(1) Stats." J.S. App. A at 23a (emphasis the court's).

ation, and the study data are all consistent. The open primary law precludes the National Party from allowing only Democrats to participate in its candidate selection process. It constitutes a severe infringement on the Party's exercise of its rights, one that strikes at the core of freedom to associate in a political context.

III. WISCONSIN HAS NO COMPELLING INTEREST THAT JUSTIFIES THE BURDEN UPON THE PARTY'S ABILITY TO ESTABLISH AND PASS UPON THE QUALIFICATIONS OF ITS CONVENTION DELEGATES.

The Wisconsin court concluded that, even if the statute imposed a substantial burden on the Party, the state has a compelling interest in maintaining an open primary. That interest, it says, is "to preserve the overall integrity of the electoral process by providing secrecy of the ballot, thereby encouraging increased voter participation and ensuring that the primary . . . [is] conducted in a fair and orderly manner." J.S. App. A at 30a. Yet, this Court held directly to the contrary in *Cousins*. A state's interest "in protecting the integrity of its electoral process cannot be deemed compelling in the context of the selection of delegates to the National Party Convention . . . . '[T]he convention itself [was] the proper forum for determining intraparty disputes as to which delegates [should] be seated.'" 419 U.S. at 491 (quoting *O'Brien v. Brown*, 409 U.S. 1, 4 (1972)). *Cousins* by itself should have been dispositive below on the compelling state interest issue.

The Wisconsin court also tried to identify several elements of the State's interest in "preserving the integrity of its electoral processes." They were: encouraging voter participation; protecting voters' "privacy of associ-

ation," which avoids harassment of voters on account of their political affiliations; and protecting the "right to vote" in the Democratic presidential primary. J.S. App. A at 30a-32a.

(1) Specifically, the court asserted that participation may be reduced by the required declaration of affiliation. Without a record on the question, however, there is no basis for the assertion that there is in fact wider participation in an open primary, as opposed to a primary limited to publicly affiliated voters. Indeed, "turnout rates [are] higher in closed-primary states than in open-primary states." D. Ippolito & T. Walker, *Political Parties, Interest Groups, and Public Policy: Group Influence in American Politics* 195 (1980); *accord*, A. Ranney, *Participation in American Presidential Nominations, 1976* 27-29 (1977).

(2) The Wisconsin court also cites no evidence of voter harassment either in Wisconsin or in the numerous states where state statutes require affiliation through registration on public rolls. *See Nader v. Schaffer*, 417 F. Supp. 837, 844 (D. Conn.), *aff'd mem.*, 429 U.S. 989 (1976). The state's bare assertion of an interest is insufficient to justify its infringement of the Party's First Amendment rights under the strict standard of scrutiny applicable here.

(3) Finally, the Wisconsin court cited cases purportedly supporting its claim that the open primary statute preserves its citizens' "fundamental right to vote" in the presidential primary. J.S. App. A at 33a-35a. That assumes erroneously that Republicans and other non-Democrats have a "right" to influence the choice of the Democratic candidate. In any event, the respondents in *Cousins* relied upon the same cases. *See* Brief for Respondents at 25-31, *Cousins v. Wigoda*, 419 U.S. 477 (1975). This Court said in response:

> Consideration of the special function of delegates to such a [national party nominating]

> Convention militates persuasively against the conclusion that the asserted interest constitutes a compelling state interest.

419 U.S. at 489. *See Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567, 588 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976).

IV. EVEN IF ONE OF THE INTERESTS LISTED BY THE COURT WERE SUFFICIENTLY COMPELLING, THE WISCONSIN OPEN PRIMARY STATUTE FAILS TO EMPLOY THE LEAST RESTRICTIVE MEANS AVAILABLE TO ACHIEVE THOSE GOALS.

Even if the interests asserted by Wisconsin were "compelling," the statute does not use the least restrictive means available for fostering those interests. Where a state burdens fundamental rights, "a heavy burden of justification is on the State" to show that the means chosen to advance its compelling interest are tailored to serve the state's interest and do not unnecessarily burden constitutionally protected activity. *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972). If less burdensome, but reasonable, means are available, "a State may not choose the way of greater interference." *Id.*

(1) The Wisconsin court asserted that the open primary law "encourages participation"; although, as noted, it had no evidence that a requirement of public party affiliation discourages participation. In any event, the State could use less restrictive means to encourage participation. For example, it could promote participation by educating voters or by improving the accessibility and convenience of polling places.

(2) The open primary statute, the Wisconsin court said, protects voters from political harassment. But the State has plenary power to impose civil and criminal

penalties for political harassment. None of the alternative means available to Wisconsin to deal with harassment would interfere with the Democratic Party's right to define those who may influence its nominating processes.

(3) Wisconsin's assertion that the open primary law protects its citizens' "right to vote" ignores the fact that a closed primary statute would also confer a right to vote, but without infringing upon the Party's rights. A declaration of affiliation raises no obstacle to exercising the franchise.

Despite this array of less drastic alternatives, the Wisconsin court concludes that the law "is drawn with the 'precision' required to pass constitutional tests." J.S. App. A at 32a. The Wisconsin court asserted that "[r]ecognizing that a private declaration of party preference rather than a public-recorded one might tempt some to cross over, the legislature has taken measures to reduce the temptation and to protect the party's associational interests." *Id.* But, the opinion fails to identify any such measures, other than the fact that the ballot procedures permit voting for only one party's candidates. The opinion nowhere explains how the statutory procedure prevents nonadherents from voting in the Democratic primary. Indeed the statute does not prevent crossover voting—as shown by the Wisconsin court's own concession on the point, the Adamany study, the Wisconsin Attorney General's position below, and the Party's historic experience.

In sum, Wisconsin has failed to demonstrate either a compelling interest in overriding the Party's exercise of its associational rights or the unavailability of less drastic means to advance whatever interest it may have. Under *Cousins v. Wigoda* and traditional First Amendment tests, Wisconsin's interest in the open primary statute must yield to the Democratic Party's vital right to freedom of political association.

CONCLUSION

For 12 years, the National Democratic Party has made prodigious efforts to ensure that its nominating processes are open to fully effective participation by all Democratic voters. It has adopted rules to guarantee that formerly underrepresented groups—blacks, other minorities, women, and youth—have a fair opportunity to participate. As a corollary, it seeks to assure that the expanded opportunities to influence selection of the Party's presidential candidate are neither diluted nor distorted by participation of Republicans, independents, and other non-Democrats. The Party has continually strengthened its rules on who may participate based on unsatisfactory experience. The rule and its objectives lie in the "core area" of protected associational activity. The Wisconsin Supreme Court's order would infringe severely on the Democratic Party's effort to conduct its affairs, setting reform efforts back at least 12 years.

WHEREFORE, the National Democratic Party respectfully requests this Court to reverse the order of the Wisconsin Supreme Court on appeal.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1980

DEMOCRATIC PARTY OF THE UNITED STATES OF AMERICA and DEMOCRATIC NATIONAL COMMITTEE,

Appellants,

vs.

WISCONSIN ex rel. BRONSON C. LA FOLLETTE and DEMOCRATIC PARTY OF WISCONSIN,

Appellees.

On Appeal From The Supreme Court of Wisconsin

BRIEF OF APPELLEE DEMOCRATIC PARTY OF WISCONSIN

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QUESTION PRESENTED

Does the First Amendment to the Constitution permit a national political party to veto state law and acts of Congress which determine voter qualification for participation in Federal Presidential Primary Elections?

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In the
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OCTOBER TERM, 1980

No. 79-1631

DEMOCRATIC PARTY OF THE UNITED STATES OF AMERICA and DEMOCRATIC NATIONAL COMMITTEE,

Appellants,

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Appellees.

On Appeal From The Supreme Court of Wisconsin

BRIEF OF APPELLEE DEMOCRATIC PARTY OF WISCONSIN

STATEMENT OF THE CASE

The Democratic Party of Wisconsin (hereinafter "State Party"), essentially agrees with the Statement of the Case presented by the National Party and the Attorney General of Wisconsin. In addition, the following historical

background of the Wisconsin Open Presidential Preference Primary (hereinafter "Open Primary") is relevant.[1]

Prior to the adoption of the primary system in Wisconsin, nominations took place at caucuses conducted by the political parties pursuant to Wisconsin Election Laws. Nominations were made from the floor. Ballots were then prepared, and the actual selection was made when the persons attending the caucuses marked the ballots in private.

In Wisconsin and elsewhere, dissatisfaction with these party-controlled nominating processes arose at the turn of the century. Direct primary legislation was introduced to replace these party-conducted and controlled caucuses.

> "By the end of the nineteenth century, the reformers' charges against the party bosses and the vested interests who worked with them reverberated throughout the land. It was this rising discontent among the middle class—the small businessman, members of the professions, and the independent farmers—that spawned the Progressive movement. From this protest movement was to emerge the direct primary system and first major reform of the national nominating convention in almost a century—the presidential primary." J. Davis, *Springboard to the Whitehouse* (1967).

In 1897, a bill was introduced for a closed primary in Wisconsin. Assembly Bill 580, Section 5 (1897). This bill did not pass. In 1899, a similar bill was introduced without success. Assembly Bill 393 (1899). In 1901, Assembly Bill 98 was introduced, along with Senate Bill 73. Both of

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[1] All of the material here has been paraphrased from Wisconsin Legislative Reference Bureau, Research Bulletin 75-RB-1, *The Wisconsin Presidential Primary: Open or Closed?*, 5-8 (August, 1975) [hereinafter Research Bulletin 75-RB-1]. Library of Congress No. KSW 2420.L4, 75-1.

these bills contained provisions for closed primaries. Substitute Amendment No. 1 was introduced to the Assembly Bill which provided for an open primary system, abolishing the closed primary requirement that a voter state publicly that he is a party member as a condition to voting. Although this bill passed the Assembly, it was defeated in the Senate. The Senate Bill passed with an amendment that made a primary system optional. Governor Robert M. La Follette vetoed this bill. Ultimately, Substitute Amendment No. 1 to Assembly Bill 98 (1901) was reintroduced and enacted in 1903 as Chapter 451, Laws of 1903. This bill created the first mandatory primary laws in the United States.[2]

The sketchy legislative history surrounding the debate of the Wisconsin Open Primary Law discloses significant concern that any closed system would be unconstitutional, would disenfranchise independent voters or would destroy the Australian ballot which had been recently adopted in 1889. The March 1, 1901 Milwaukee Sentinel reported:

> "It is unquestioned that any act of the legislature which deprives any [otherwise qualified] man of the right to vote at any election . . . is unconstitutional and void. There can be no question but that the primary election contemplated by the Stevens Bill, known as the Primary Election Bill, is an election within the clause of the constitution referred to, since it is an election authorized by law, conducted by public officials, at public expense, and because the public funds can be constitutionally used in this way only on this theory. If this bill does not give an opportunity for

[2] However, as noted in the Bulletin, Florida and Oregon claim this distinction. Florida's law was not mandatory, and Oregon's law was enacted by initiative after Chapter 451, Laws of 1903 was passed but prior to its approval by election held on November 8, 1904. Research Bulletin 75-RB-1, at 7.

> every qualified elector to cast his vote at one or the other of the primary elections to be held for the various parties, then the electors so discriminated against are disenfranchised . . . [E]very step toward the selection of public officers is an essential part of the right to suffrage, since the right to nominate flows necessarily from the right to vote, and nomination and election together constitute the choice of the officer."

Mr. M. G. Jeffries stated at a public hearing held on February 19, 1901:

> "Keep constantly before you that we are considering a particular bill, a bill that has not had the approval of the people or of any convention. Under it to vote at a primary election one must swear that he belongs to a certain party and intends to vote with that party at the next election. What becomes of the young man who has never voted and who cannot swear that he belongs to any party. How about the great floating vote which each party appeals to upon principles? They are both disenfranchised because they cannot swear that they belong to a political party, even though they may intend to vote with it in the future." Research Bulletin 75-RB-1, at 7.

It is further reported that Mayor Rose of Milwaukee expressed his concern that the closed primary would destroy the Australian ballot.

The 1903 law did not specifically address the election of delegates to national political conventions. This aspect of the Wisconsin law was created in Chapter 369, Laws of 1905 when delegates to national conventions were required to be elected in open primaries in Wisconsin.[3]

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[3] The complete historical analysis of the Wisconsin Legislative Reference Bureau regarding the evolution of the Wisconsin Presidential Preference Primary is contained in an Appendix to this brief.

SUMMARY OF ARGUMENT

This case involves a conflict between a Wisconsin law which regulates voter qualifications for a Presidential Preference Primary and a rule of the National Party. The National Party only recognizes delegations to its national convention whose apportionment between the various contenders for the Presidential nomination is determined by the results of either a closed primary, party-conducted caucuses or party conventions. The State of Wisconsin has an open primary. There is no requirement that a voter publicly state party preference as a condition to voting.

The National Party believes it can disregard the results of the Wisconsin Open Primary by claiming rights pursuant to the First Amendment to the United States Constitution as enunciated by this Court in *Cousins* v. *Wigoda,* 419 U.S. 477 (1975). The State Party believes that it enjoys substantial First Amendment rights which are also enjoyed by the National Party. However, the State Party believes that primary elections are federal elections which are subject to control by the state and federal governments. Voter qualifications for federal elections are determined initially by states subject to congressional regulation.

The Constitution recognizes primary elections for President and at various places has established voter qualifications. Additionally, Congress has enacted myriad election laws regulating primary elections for President. To date, Congress has not enacted a law requiring public disclosure of party preference as a condition to casting a primary vote. The National Party is attempting to displace the Congress of the United States. In the absence of congressional action, the Wisconsin Open Primary law is valid.

A state can utilize a wide variety of systems for selecting candidates for public office. If a state chooses to establish a primary system, protected voting rights cannot be denied. Here, Wisconsin has granted full voter participation in the primary process. The National Party wants to impair voting rights.

The State Party believes that the states and Congress can determine voter qualifications for Presidential primary elections as long as the statutory scheme does not unduly infringe upon protected First Amendment rights. In this case, the Wisconsin law is a closely drawn regulation which does not affect the associational rights of the National Party.

The Wisconsin law is narrow in scope because delegates to the National Convention are not elected at the primary. All the primary does is compel the apportionment of delegates from Wisconsin. The delegates themselves are elected at party-conducted caucuses. Participation in the caucuses is limited to persons who publicly subscribe to the general principles of the Democratic Party.

The stated goal of the National Party Rule against open primaries is to prevent dilution of the choice of party identifiers. However, historically, the actual results of the Wisconsin Presidential Preference Primary fairly reflect the division of preferences among Democratic identifiers in the electorate. Indeed, the Wisconsin Open Primary has been singled out by the National Party as demonstrative of a primary electorate which comes close to the Democratic electorate which votes in November.

The National Party threatened to impose a caucus system in Wisconsin to displace the Open Primary. Studies show that less than 4% of the voters participate in caucuses. The National Party is threatening to create a sys-

tem where some citizens' votes count more than other citizens' votes. In this context, the threatened displacement of the Wisconsin Open Primary is similar to the results obtained when states fail to properly apportion.

Generally speaking, citizens have an inherent right to engage in elections. Whenever a state wishes to encumber that right in any way, the burden is upon the state to justify its regulations. The National Party is concerned with crossover voters, i.e., independents and Republican adherents who vote in the Democratic Primary. It is conceded that there is no evidence of raiding in Wisconsin, i.e., Republicans who vote in the Democratic Primary to weaken the choice of the Democratic Party. Generally speaking, Wisconsin voters cast their ballot for the person they want to be President. To date, the Court has only recognized the authority of a state to create closed primaries to prevent raiding. The Wisconsin legislative decision that there is no raiding ought to be respected.

The State Party believes that when it and the National Party engage in Presidential candidate selection, its activities constitute state action. The extensive state entanglement with the party's candidate selection process is obvious. Under any test employed by the Court, state action exists. There can be no serious dispute that states and Congress have the power to regulate a private entity when it engages in such a public function. Thus, the states and Congress have the power to create primary elections and to determine federal voter qualifications despite any party wishes to the contrary.

Decisions of the Court subsequent to *Cousins* v. *Wigoda, supra,* demonstrate that the decision did not provide the National Party with the general power to overturn state law or Acts of Congress which differ from party rules.

States still maintain their historic role of insuring that elections are "conducted in a fair and orderly fashion."

Cousins involved a state court injunction which absolutely prohibited some Illinois citizens from becoming delegates to the Democratic National Convention. It was the scope of the injunction which prompted the Court to find a serious infringement upon the associational rights of the National Party. In stark contrast to the Illinois mandate, the Wisconsin Supreme Court merely prevented the National Party from refusing to seat a Wisconsin delegation on the ground that the delegation was apportioned pursuant to the results of the Wisconsin Open Primary. The Wisconsin Supreme Court and the Wisconsin Legislature do not attempt to regulate how individual delegates are in fact chosen by the State or National Parties.

Obviously, Wisconsin can conduct an open primary. Perhaps the real question is whether Wisconsin can make the results of its Open Primary binding upon Wisconsin delegates to the National Convention. The Court has held that states can enact effective means to achieve its aims. This closely drawn statute and injunction merely make the Wisconsin law effective without impairing any First Amendment rights of the National Party.

ARGUMENT

I.

PRESIDENTIAL PREFERENCE PRIMARIES ARE FEDERAL ELECTIONS WHICH ARE REGULATED BY THE STATE AND FEDERAL GOVERNMENTS.

The National Party hypothesizes in its brief that they are beyond the control of the state and federal governments when they nominate candidates for President and Vice President of the United States. The linchpin of the National Party's position is its claims under the First Amendment to the United States Constitution of freedom to associate as expressed in its perceptions of the scope of *Cousins* v. *Wigoda,* 419 U.S. 477 (1975).

The State Party believes that there are substantial First Amendment rights which it enjoys and which are enjoyed by the National Party. However, the State Party believes that there is a significant distinction which must be drawn when a political party acts in its private political capacities as opposed to those instances when a political party acts in its public capacities. The State Party believes that when it acts in its private political capacities, it is virtually beyond all control of the government; this is the precise holding of *Cousins.* However, in the United States, political parties often perform significant public functions.

In Wisconsin, recognized political parties[4] appoint elec-

[4] The term "recognized politcal party" is used to describe a political party which has demonstrated sufficient voter support under Wisconsin law thereby allowing it to participate directly in govern-

(footnote continued)

tion officials, § 7.38(1), Wis. Stats.; appoint election observers, § 7.38(1), Wis. Stats,; have direct representation on the State Elections Board, § 15.61, Wis. Stats.; participate in the appointment of the Board of Election Commissioners in Milwaukee, § 7.20, Wis. Stats.; determine the names of candidates who appear on the Wisconsin Presidential Preference Primary Ballot, § 8.12(1)(a), Wis. Stats., J.S. App. A at 55a-56a; and recognized political parties have automatic ballot access with the ballots containing the party names, §§ 5.62(1) J.S. App. A at 50a-51a and 8.16(7), Wis. Stats.

The most significant point of interface between the public and private roles of a political party is at a primary election. One of the questions presented is whether political parties have absolute control over primary elections concerning candidates for President. The State Party believes that it is beyond any dispute that primary elections are federal elections which can be controlled and regulated by the United States Constitution, Acts of Congress and state law.

The Twenty-fourth Amendment to the Constitution specifically recognizes that primary elections for President are public elections:

> "The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President,

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(footnote continued)

ment activities. It usually means a party which has maintained a vote of at least 1%. § 5.62(1)(b), Wis. Stats. J.S. App. A at 50a-51a. *See also,* §§ 5.02(13) J.S. App. A at 43a, 8.17 and 8.175, Wis. Stats. Ballot access in the first instance is governed by Section 5.62(2), Wis. Stats. J.S. App. A at 51a. *See* § 8.16(4), Wis. Stats. A 10% vote is necessary to obtain representation on the Elections Board. § 15.61, Wis. Stats.

> or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."

It is beyond doubt that the Fifteenth Amendment to the Constitution prohibits excluding blacks from primary elections for President of the United States. *See* Brief, *infra*, at 15-16, 32. Women cannot be excluded from the nominating process, Nineteenth Amendment. Eighteen year olds cannot be excluded, Twenty-sixth Amendment.

Congress recognizes that Presidential primary elections are federal elections. For example, The Overseas Citizens' Voting Rights Act of 1975 defines a "federal election" as:

> "any general, special or primary election held solely or in part for the purpose of selecting, nominating, or electing any candidate for the office of the President, Vice President, Presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Resident Commissioner of the Commonwealth of Puerto Rico, Delegate from Guam, or Delegate from the Virgin Islands." 42 U.S.C. § 1973 dd(1).

That definition is nothing more than the most recent recognition by Congress that Presidential Preference Primaries are federal elections which Congress can regulate. Wisconsin law which protects federal overseas voting is applicable to the Wisconsin Presidential Preference Primary. § 8.24(2), Wis. Stats. Title 42 U.S.C. § 1971(d) provides federal protection from intimidation, threats or coercion with respect to primary elections for the office of President of the United States. Title 42 U.S.C. § 1973i(c) outlaws the giving of false information upon registering for, *inter alia*, "primary elections held solely or in part for the purpose of selecting or electing any candidate for

the office of President, Vice President, Presidential elector. . . .'' Title 42 U.S.C. § 1973i(e)2 makes an identical reference with respect to prohibiting voting more than once. State officials are required by federal law to retain presidential primary election records. 42 U.S.C. § 1974.

Likewise, the federal criminal code contains various regulations of presidential elections at 18 U.S.C. § 591, *et seq.* Election is defined as follows:

> '' 'election' means (1) a general, special, primary, or runoff election, (2) a convention or caucus of a political party held to nominate a candidate, (3) a primary election held for the selection of delegates to a national nominating convention of a political party, or (4) a primary election held for the expression of a preference for the nomination of persons for election to the office of President.'' 18 U.S.C. § 591(a). *See also,* 18 U.S.C. § 601(b)(2).

In this chapter, Congress then proceeds to provide federal protection for voters and closely regulates tactics used in campaigns for President, including primaries.

The Presidential Primary Matching Payment Account Act, 26 U.S.C., § 9031, *et seq.* defines a ''candidate'' as:

> ''an individual who seeks nomination for election to be President of the United States. For purposes of this paragraph, an individual shall be considered to seek nomination for election if he (A) takes the action necessary under the law of a State to qualify himself for nomination for election, (B) receives contributions or incurs qualified campaign expenses, or (C) gives his consent for any other person to receive contributions or to incur qualified campaign expenses on his behalf.'' 26 U.S.C. § 9032(2).

''Primary election'' is defined as:

> ''an election, including a runoff election or a nominating convention or caucus held by a political party, for the selection of delegates to a national nominating con-

> vention of a political party, or for the expression of a preference for the nomination of persons for election to the office of President of the United States." 26 U.S.C. § 9032(7).

It thus seems abundantly clear that presidential preference primaries, when provided by states, are considered by the Constitution and the Congress to be federal elections subject to both direct constitutional control and congressional regulation.

With respect to federal elections, it is generally conceded that the Constitution authorizes states in the first instance to determine voter qualifications. However, "(w)ith respect to elections to federal office . . . the Court has held that Congress has power to establish voter qualifications." *Kusper* v. *Pontikes,* 414 U.S. 51, 57 n. 11 (1973), citing *Oregon* v. *Mitchell,* 400 U.S. 112 (1970).

Wisconsin has determined that in all federal primary elections, including the presidential preference primary, Wisconsin voters are entitled to vote without publicly disclosing party preference as a condition to voting. Congress has not established different voter qualifications.

It is the position of the National Party that all its rules and regulations concerning voter qualifications are in all respects superior to the law of Wisconsin. The National Party thereby presumes to displace the Congress of the United States.[5] While Congress, in many instances, has

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[5] Indeed, the National Party believes that any action of Congress regulating the nominating process, including Congressional creation of regional primaries or national primaries constitutes "interference" or "intrusion" into party affairs. Presumably, the National Party believes that it possesses the absolute power under *Cousins* to overturn Acts of Congress which attempt to regulate the selection of candidates for President. See *Openness, Participation and Party Building: Reforms for a Stronger Democratic Party,* Exhibit 4 at 31-38, J.A. 61-70.

exercised its power to determine voter qualifications for primary elections for President, it has declined to date to institute closed primaries for federal offices. In the absence of Congressional action, the Wisconsin open presidential primary law is valid.

II.

THE FIRST AMENDMENT CLAIMS OF THE NATIONAL PARTY ARE OVERSTATED; COUSINS v. WIGODA IS INAPPLICABLE.

The National Party, relying primarily upon *Cousins* v. *Wigoda,* 419 U.S. 477 (1975), claims a virtual monopoly on determining voter qualifications for its nominating process. The National Party claims power under the First Amendment and *Cousins* to overturn any law of any state or Congress which deviates from the policies of the National Party.

While there can be no doubt that political parties enjoy substantial First Amendment rights and privileges, those rights are not absolute. It is the position of the State Party that there are a significant number of activities of a political party which are completely immune from state or federal regulation. In the context of a National Convention, these include the absolute right of the National Party to determine its positions on matters of public policy. The National Party under *Cousins* has absolute authority to create rules and objectives with respect to sex, race, age, religion, economic status and ethnic origin of delegates and alternates and compel complete compliance with them. Furthermore, the State Party believes that if it and the National Party merely endorsed candidates for public office, both would be completely immune from governmental regulation concerning the endorsement process.

However, neither the State Party nor the National Party performs a mere endorsement role in the political process. The Democratic Party of Wisconsin engages in significant state activities and its name appears on the ballot. The Presidential and Vice Presidential candidates of the National Party obtain automatic ballot access and party identification in Wisconsin. Under these circumstances, the purely private role of the State Party and the National Party have an interface with a public role when they determine candidates for state and national offices. That interface takes place at primary elections in Wisconsin. The State Party believes that at that point of interface, and only at that point, the public interest in determining the qualifications of electors far outweighs any claimed First Amendment right asserted by the National Party.

As pointed out in the last section, the Constitution and Congress have recognized that primary elections with respect to federal offices are an integral part of the federal election process. These enactments have confirmed prior decisions of the Court that primary elections are integral parts of the total election process. *Storer* v. *Brown,* 415 U.S. 724, 745 (1974); *Terry* v. *Adams,* 345 U.S. 461, *reh. denied* 345 U.S. 1003 (1953); *Smith* v. *Allwright,* 321 U.S. 649, *reh. denied* 322 U.S. 769 (1944); *United States* v. *Classic,* 313 U.S. 299 (1941); *Nixon* v. *Condon,* 286 U.S. 73 (1932); *Nixon* v. *Herndon,* 273 U.S. 536 (1927); *Newberry* v. *United States,* 256 U.S. 232, 286 (1921).

Even though primary elections are an integral part of the election process, there is no Constitutional or Congressional requirement compelling the holding of primaries. Thus, states are free to choose whether the nominating process will be determined by primary election or by other means such as caucuses. However, if a primary is utilized,

then no state can deny protected voting rights. In *United States* v. *Classic,* 313 U.S. 299, 318 (1941), the Court stated:

> "Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article 1, Sec. 2. And this right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative."

A state has a wide range of choices. Since the Constitution does not provide for political parties, *Elrod* v. *Burns,* 427 U.S. 347, 369 (1976), a state could abolish identifying political parties on the ballot.[6] In such a political scheme, political parties would merely endorse candidates and work in support of such candidates.[7] In the event a state chooses a primary system where a political party has name identification on the ballot, it is up to

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[6] Wisconsin has abolished party identification with respect to judicial and school offices, Laws of 1913, c. 492, sec. 31; city offices, Sp. S 1912, c. 11; § 35-20, Wis. Stats. (1912); and other county and municipal offices. *See* Laws of 1951, c. 455. These elections are "nonpartisan." *See* §§ 5.60 and 8.05, Wis. Stats. (1977), J.S. App. A at 45a-50a and 52a-55a. Political parties may endorse candidates, if they wish.

[7] On the other hand a state can allow the name of a political party to appear with the name of a candidate, presumably to enlighten voters and to avoid confusion in the election process. *See Bullock* v. *Carter,* 405 U.S. 134, 145 (1972) cited with approval in *Storer* v. *Brown,* 415 U.S. 724, 732-33 (1974).

the states to determine voter qualifications subject only to the limitations imposed by the Constitution, and further subject to Congressional regulation with respect to federal elections.

When any election is conducted, the general constitutional proposition is that complete and unfettered voter access is the rule and any voter impairment is the exception which must be justified by the state.

> "In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. [cites omitted] This 'equal right to vote,' Evans v. Cornman, supra, at 426, is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways. [cites omitted] But as a general matter, 'before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.'' *Dunn* v. *Blumstein,* 405 U.S. 330, 336 (1972).

In this context, certain restrictions are allowed. A state may, but is not required to, impose a reasonable registration system to prevent voter fraud. A state may, but is not required to, create reasonable residency requirements to prevent voter fraud and to restrict state elections to state residents. Contribution limits can be established to protect the integrity of elected officials. *Buckley* v. *Valeo,* 424 U.S. 1 (1976). Political organizations can be required to disclose their sources of funds for the same reasons. *Id.* And, with respect to primary elections, a state *may* if it chooses establish a public declaration of party affiliation as a prerequisite to voting in a party primary to prevent raiding. See *Rosario* v. *Rockefeller,* 410 U.S. 752 (1973), and *Kusper* v. *Pontikes,* 414 U.S. 51 (1973). The National

Party asserts that a state *must* establish such a restriction upon the voting franchise when demanded by a political party.

The State Party believes that, absent Congressional intervention, a state can create an open primary system under the circumstances present in this case. The State Party believes that the Wisconsin Presidential Open Primary Law is a very limited law. The State Party further believes that the National Party, in order to invalidate a state law under a claim of an infringement of its First Amendment rights, must prove that there is in fact an interference with its First Amendment rights. In any event, the State Party believes that where voter qualifications are determined, there is public activity and political parties can be highly regulated so long as the regulation does not spill over into areas protected by the First Amendment.

A. The Wisconsin Open Primary Statute is a Closely Drawn Regulation.

Delegates to the Democratic National Convention are not elected at the Wisconsin Open Primary. All the Wisconsin Open Primary does is create a system whereby a determination is made regarding the preferences of the citizens of the State of Wisconsin for the office of President of the United States. It is the only election where all of the potential candidates for President are listed and where the citizens are provided with the unique opportunity to vote for the persons they believe to be the most qualified for that office. In the November elections, the citizens' choice is limited to the candidates nominated by the political parties.

The results of the Wisconsin Presidential Preference Primary are used for the limited purpose of apportioning delegates to the various Democratic candidates for Presi-

dent by the State Party. The actual selection of delegates commences at Congressional district caucuses organized by the State Party. The only participants in the actual selection of delegates to the national conventions are persons who are willing to subscribe to the general principles of the Democratic Party and do so publicly by executing an appropriate statement to that effect. The participants in the caucuses are then separated into groups composed of persons who support the various candidates for President. Within these groups, the participants additionally declare their adherence to the party and pledge their support to the particular candidate for President. It is in these candidate caucuses, composed of persons who have publicly declared that they adhere to the principles of the Democratic Party and who further declare their support for the particular candidate involved, where the actual delegates and alternates to the national convention are selected.

All the delegates and alternates chosen at these Congressional district caucuses then meet to elect the at large delegation through a procedure which is also in complete compliance with the Democratic National Committee rules and objectives. This process is in full compliance with the National Party's rules and regulations with respect to the sex, race, age, religion, economic status and ethnic origin of the delegates as well as the rules regarding notice, timing of selection and slate-making.

Thus, the interests of the State of Wisconsin in assuring fair and orderly elections is achieved in a closely drawn manner. The only impact upon the delegate selection process imposed by the Wisconsin Open Primary is to apportion the delegates to the various contenders for the Democratic nomination for President.

B. The Wisconsin Open Primary Law Does Not Abridge Any of the Associational Freedoms of the National Party.

The Wisconsin Supreme Court recognized that the appellants had the burden of proving a substantial burden upon their associational rights. Opinion of Wisconsin Supreme Court, J.S. App. A at 18a, *State ex rel. La Follette* v. *Democratic Party,* 93 Wis. 2d 473, 499, 287 N.W. 2d 519, 530 (1980), relying on *Marchioro* v. *Chaney,* 90 Wash. 2d 298, 582 P.2d 487, 493 (1978), *aff'd* 442 U.S. 191 (1979) and *American Party of Texas* v. *White,* 415 U.S. 767, 790 (1974). The only significant difference between the Wisconsin Open Primary and other means of apportioning delegates to the Democratic contenders for President is that the Wisconsin Open Primary Law does not require persons to publicly state and have recorded their party preference as a prerequisite to voting. Stipulation of Facts, ¶¶ 18-19, J.A. at 26-27.

The principal reason advanced by the National Party for its opposition to the Wisconsin Open Primary is that there exists a potential for crossover[8] voting which might dilute the votes of Democratic Party adherents. The National Party has recognized that there is no evidence to show the existence of "raiding", i.e., Republican identifiers who vote in Democratic primaries for purposes of weakening the choice of the Democratic Party. See *Openness, Participation and Party Building: Reforms for a Stronger Democratic Party,* Exhibit 4 at 68, J.A. 7172. (hereinafter the Winograd Report). Also, *see* Skornicka, *State Action in Presidential Candidate Selection,* 1976 Wis.

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[8] Crossover in this context means independent voters who do not have any allegiance to either political party and Republicans who from time to time vote in Democratic primaries. *See* Part C, *infra.*

L. Rev. 1269, 1301-1303. Thus, the National Party opposes open primaries because it is concerned with the *possibility* of a delegation being chosen "which did not fairly reflect the division of preferences among Democratic identifiers in the electorate." Winograd Report at 68, J.A. 72. While that position reflects interesting theory, the fact of the matter is that the statewide outcome in Wisconsin has not been affected to date by crossover voting. See Skornicka, *supra*, at 1302-1303 n 206.

Significantly, none of the procedures which are acceptable to the National Party for apportioning delegates among various candidates produces convention participants which come close to fairly reflecting the statistical makeup of "Democratic identifiers in the electorate". Indeed, the Wisconsin Open Primary might be the procedure which most accurately reflects the beliefs of all Democratic identifiers in the general electorate. In any event, there is no factual basis for concluding that the Wisconsin Open Primary materially interferes with the associational goals of the Democratic Party of the United States.

The Winograd Report at 10-23, J.A. 47-57 contains an extensive study of the various systems ultilized for apportioning delegates. The Wisconsin Open Primary is also analyzed there. It is clear from these studies that closed primaries, caucuses and conventions, as well as the Wisconsin Open Primary, have participants which vary significantly from the overall statistical profile of persons who vote for the Democratic candidate at the general election. Generally speaking, all of these methods of delegate apportionment, regrettably, produce participants who are better educated, wealthier, whiter, and younger than the Democratic identifiers who vote in the November elections. *Id.* The rank and file Democratic voter is significantly underrepresented in all systems utilized for ap-

portioning delegates. In summarizing this data, the Wisconsin Supreme Court concluded: "Wisconsin's Open Primary produces an electorate which is as representative (or as unrepresentative) of 'Democratic identifiers in the electrate' as is the electorate produced by closed primaries and caucuses which are acceptable to the National Party." Opinion of Wisconsin Supreme Court, J.S. App. A, at 26a, 93 Wis.2d at 508, 287 N.W.2d at 534.

Indeed, in many statistical categories, the Wisconsin Open Primary produces a more representative electorate when compared to general election Democratic voters than any other system for apportioning delegates. For example, at page 14 of the Winograd Report, J.A. 54-55, it is stated:

> "Limited evidence on 1976 suggests that while there may be a slight tendency for conservatives to be underrepresented in Democratic primary elections (due to the fact that the overrepresented, college educated tend to be more liberal), the two electorates may not be as distant as they were in 1972. For instance, the Wisconsin primary electorate had fewer people classifying themselves as conservatives but about the same number classifying themselves as liberals in the general electorate."

Here, Wisconsin's Open Primary is singled out as demonstrative of a primary electorate which comes close to the Democratic general electorate in November. Such a result is hardly adverse to the associational rights of the National Party. The Wisconsin Supreme Court realistically evaluated the facts and found no interference.

There is more than one way to dilute the preferences of Democratic Party adherents. The National Party would have imposed a caucus system on Wisconsin in 1980 had the Wisconsin Supreme Court failed to act. A caucus sys-

tem represents the most serious dilution of the preferences of Democratic Party adherents. Studies from other states demonstrate that very few voters participate in caucuses. Less than 4% of the voters engage in such proceedings, and those who do participate are completely unrepresentative of the rank and file of the Democratic Party. *See* the Winograd Report at 15, J.A. 56-57. In 1980, in Michigan, the Democratic Party displaced the statutory open primary with a closed caucus. Only 15,000 people in Michigan determined the presidential preference wishes of all Democratic voters in the entire state. See *New York Times,* April 27, 1980, at 1, col. 2. Many Demorcratic adherents are excluded from participation in this crucial part of the electoral process by the mere fact that the vast majority of them do not participate in caucuses. The preferences of Democratic adherents are diluted by nonparticipation.

In this context, the position of the National Party is not unlike the position of those states which failed to reapportion and thereby created a situation where some citizens' votes counted more than other citizens' votes. Since there is in fact no way that the National Party can compel the Wisconsin Legislature to enact a law which accommodates the predilections of the National Party, the actual choice presented to the Wisconsin Supreme Court was whether Wisconsin's open primary or a small number of party adherents in caucuses would determine the apportioning of Wisconsin delegates to the Democratic convention. Wisconsin was faced with the threat that only the vote of an extremely small number of citizens participating in caucuses would count while the votes of the many who participated in the open primary would be totally ineffective. The threat to equal voter participation in the election process was as great or greater than the results which obtain when a state fails to properly apportion itself. The

rationale of *Reynolds* v. *Sims,* 377 U.S. 533, 555 (1964) is fully applicable here:

> "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

The dissent of Mr. Justice Douglas in *South* v. *Peters,* 339 U.S. 276 (1950) was cited with approval in *Reynolds* v. *Sims,* 377 U.S. at 555 n. 29 and is particularly appropriate.

> "There is more to the right to vote than the right to mark a piece of paper and drop it in the box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted . . . It also includes the right to have the vote counted at full value without dilution or discount. . . . That federally protected right suffers substantial dilution . . . [where a] favored group has full voting strength . . . [and] [t]he groups not in favor have their votes discounted."

When the results of the Wisconsin Open Primary are pitted against those of a caucus, it is clear that in a caucus votes of Democratic adherents are diluted by the simple fact that less people participate in caucuses. The Wisconsin Supreme Court, when faced with that choice, correctly opted for a full participatory system. That choice posed no threat to the associational objectives of the National Party and clearly protected citizen access to the Presidential nominating process.

Another feature of the Wisconsin Open Primary which demonstrates that it does not interfere with the associational rights of the National Party is the fact that the delegates chosen in party caucuses by publicly declared

Democrats are only required to vote for the candidates apportioned by the open primary on the first ballot and "on any additional ballot, unless released by said candidate, [or] until said candidate fails to receive at least one-third of the votes authorized to be cast. . . ." § 8.12(c)(5), Wis. Stats.; J.S. App. A, at 58a-59a.

The National Party theorizes that the Wisconsin Open Primary could have an adverse impact upon the candidate selection process at its national convention. Just what that impact might be, however, is not only impossible to identify, but apparently is hard to describe. If the Wisconsin Open Primary delegation helps a first ballot nomination, then, obviously, the Wisconsin open primary results are significantly in accord with other Democratic voter preferences from all over the country and can in no way be said to have interfered with the National Party. Should the balloting proceed beyond the first ballot, the Wisconsin delegates who were pledged to a candidate who did not receive at least one-third of the delegate votes from all national convention delegates in the first ballot are released under Wisconsin law to "vote according to [their] own judgment." *Id.* The 1980 National Party Rules only required bound delegates for the first ballot.[9] Under either rule delegates would become uncommitted. Since the

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[9] Although the stipulation asserts that the only difference between the Wisconsin Open Primary and the 1980 Rules for the National Convention is that the voters in the primary are not required to publicly state their party preference as a prerequisite to voting, the fact is that there is one difference.

National Party rules required a candidate to receive either 15%, 20% or 25% of the vote as a prerequisite to obtaining any delegates. Winograd report, at 54. Wisconsin law compels a party either to a winner-take-all election or a complete apportionment. The rationale of the National Party is that only serious candidates with

(footnote continued)

delegates themselves are all chosen in full compliance with the rules of the National Party, it is difficult to conceive of any set of circumstances in which the open primary of Wisconsin would as a matter of fact interfere with the nomination process.

The National Party attempts to overcome this evidence by showing that persons who in the past have considered themselves to be independent have voted differently in Wisconsin than persons who have considered themselves to be Democrats. See Brief for Appellants, at 29-32. The principal support for this assertion is Adamany, *Cross-over Voting and the Democratic Party's Reform Rules,* 70 Am. Pol. Sci. Rev. 536, 540 (1976). Brief for Appellants, at 30. However, even a cursory review of that article exposes its unreliability. The samplings taken by the author were extremely small and subject to great error. The author himself states that "[i]n any case, the survey reports of candidate voting must be treated cautiously in the . . . . analysis." Adamany at 537.

The 1964 election is completely unrealistic because Governor George Wallace was not pitted against the incumbent

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(footnote continued)

substantial backing should obtain delegates to the National Convention.

Although these issues are not before the Court, the State Party believes that it and the National Party, just as a state, are entitled "to prevent the clogging of its election machinery, [to] avoid voter confusion and [to] assure that the winner is a choice of a majority, or at least a strong plurality of those voting . . . [And that it] has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies." *Bullock* v. *Carter,* 405 U.S. 134, 145 (1972). In addition, the State Party believes that it and the National Party just as a state have a "substantial . . . interest" in encouraging compromise and "political stability" as a part of its freedom of association. *Storer* v. *Brown,* 415 U.S. 724, 729 (1974).

President, Lyndon Johnson. Instead, Wisconsin Governor John W. Reynolds ran as a favorite son. The George Wallace vote was undoubtedly a reflection of a certain amount of voter dissatisfaction with Governor Reynolds. That primary exposed a weakness in the Wisconsin law which was corrected. In 1966, the legislature abolished favorite sons by limiting ballot access to persons who are considered serious contenders for party nominations. Laws of 1965, ch. 666, sec. 1.

Perhaps the most serious fallacy in the National Party's reasoning is that it fails to show that the results of the Wisconsin Open Primary would differ significantly from the results of a closed primary system which the National Party would approve. The National Party rules do not require any particular preregistration system. All that the National Party requires is a public recording of party preference as a precondition for voting. Under Rule 2A, Wisconsin would be free to merely require this statement at the time of voting. Crossover voting would not be prevented by such a system. Any person of any political persuasion would be eligible to vote in the Democratic primary if that person would merely be willing, for the purpose of that one election alone, to state that the Democratic ballot is preferred for that election. None of the data or analysis presented by the National Party have even attempted to show whether requiring public disclosure would prevent independents from voting in the Democratic primary or would even prevent some Republicans from voting in the Democratic primary.

The actual results of the Wisconsin primary since 1964 support the conclusion that the Wisconsin results are similar to those obtained in closed primaries or caucuses. In 1968, Senator Eugene McCarthy won the Wisconsin primary. That choice was probably consistent with the

results of closed systems.[10] In 1972, Senator George McGovern won the Wisconsin primary. He ultimately became the nominee of the party on the first ballot. Yet, the National Party incredibly seems to argue that the results of the Wisconsin primary were not representative of the choice of Democratic adherents. President Jimmy Carter won the Wisconsin primary in 1976 and won the Wisconsin primary in 1980 by a substantial margin; and obviously, obtained the nomination on the first ballot both times.

The Wisconsin Supreme Court correctly recognized that there was no impact upon any of the associational rights of the National Party. Since that is the case, the National Party is presenting a theoretical problem to the Court. As noted recently in another setting, theoretical problems which are not in accord with reality do not merit interference with state law. *See Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont,* ..... U.S. ....., 100 S.Ct. 1223, 1236 (1980). In reality, there is no impact upon the associational rights of the National Party and, therefore, the decision of the Wisconsin Supreme Court declaring that the associational rights of the National Party are not impaired is in accord with decisions of the Court and should be affirmed.

C. The Court Has Never Expressly Authorized States To Impair Voter Access For Purposes Of Controlling Crossover Voting.

"Raiding" is the term used to define party adherents who vote in a primary of another party for purposes of weakening the choice of the other party. It is to be distin-

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[10] At the time of the Wisconsin primary, President Johnson had just withdrawn from contention and Senator Robert Kennedy had just entered the race, but was not on the ballot. *T. White,* The Making of the President, 1968, 130, 141 (1969).

guished from the term "crossover" which means independent voters who vote in a party primary and party adherents who from time to time vote in other party primaries. *Rosario* v. *Rockefeller, supra,* and *Kusper* v. *Pontikes, supra,* only authorized party registration as a prerequisite to voting to prevent raiding. It does not follow that a state must conclude that raiding is a serious problem, or that a state must act to prevent raiding. Here, the National Party concedes that there is no evidence of raiding. Winograd Report, Exhibit 4 at 68, J.A. 71-72. The National Party is not concerned with raiding. It is only concerned with crossover voters who vote in the Democratic primary for a candidate they want to be President. To date, the Court has not recognized the power of a state to impair voting rights to prevent crossover voting.

Recently the Supreme Court of Washington upheld its blanket primary.[11] *Heavey* v. *Chapman,* 93 Wash.2d 700, 611 P.2d. 1256 (1980). On this point, that Court said:

> "We believe the failure of plaintiffs even to attempt to show a substantial burden to their right of association is dispositive of the case. Nonetheless, consideration should be given to two recent cases cited by plaintiffs which deal with primary elections: *Rosario* v. *Rockefeller,* 410 U.S. 752, 36 L.Ed.2d 1, 93 S.Ct. 1245 (1973), and *Nader* v. *Schaeffer,* 417 F.Supp. 837 (D. Conn. 1976), *aff'd,* 429 U.S. 989, 50 L.Ed.2d 602, 97 S.Ct. 516 (1976). Both of these cases concerned the exclusion by statute of voters from participating in party primaries. In neither case was the situation similar to those where the statutes in issue do not restrict but rather open the primary for full participation by all citizens. As pointed out in *Nader,* there are a number of actions a state legislature may take to preserve '"the integrity of the electoral process"'.

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[11] In a blanket primary, a voter is allowed to alternate votes between political parties when primary votes are cast for more than one office.

> *Nader,* at 846. *See Rosario* v. *Rockefeller, supra.* But there is no constitutional requirement that these actions be taken; rather it is not unconstitutional if they are taken.
>
> * * *
>
> *Nader* and *Rosario* hold that a state *may,* if it chooses, institute a closed primary system. *But see Kusper* v. *Pontikes,* 414 U.S. 51, 38 L.Ed.2d 260, 94 S.Ct. 303 (1973). *Nadar* and *Rosario* neither establish any mandatory duty that a state *must* have closed primaries nor do they forbid a blanket primary." 611 P.2d at 1258-1259.

It is clear that Wisconsin does not consider raiding to be a problem. The National Party does not consider raiding to be a problem. Citizens should only be excluded from the nominating process when there is a legislative finding that raiding is an actual threat to the nomination process. A legislative finding either way ought to be respected and surely ought not be disturbed where it is conceded that no raiding exists.

D. A Political Party Engages in a Public Function When It is Involved in a Nominating Election and is Subject to Significant State or Federal Regulation With Respect to the Conduct of the Election.

The National Party is essentially a private asscociation, but when it engages in presidential candidate selection, its activities become so imbued with state action that a broad panoply of rights, regulations and responsibilities necessarily become applicable. This issue was expressly reserved by the Court in *Cousins* v. *Wigoda,* 419 U.S. 477, 483 n. 4 (1975) and earlier avoided in *O'Brien* v. *Brown,* 409 U.S. 1 (1972). This case presents a situation which permits its examination and resolution.

The extensive state entanglement with the parties' candidate selection process is obvious, and the conclusion is in-

evitable: the parties perform a fundamental and critical public function when they nominate candidates for president; when they do so it is in a manner which, as a totality, is so intertwined with the state that they are unable to avoid those aspects of state regulation, which, if imposed, are directed toward compelling state interests.

The state entanglement with parties' nomination processes originates in the Constitutional delegation to states of the responsibility to determine the time, place and manner of selecting presidential electors. U.S. Const. Art. II, § 1. *See also, Burroughs & Cannon* v. *United States,* 290 U.S. 534, 544 (1934). Under this extensive grant of power, states pass comprehensive and complex election codes regulating in substantial ways the registration and qualification of voters and the elections and qualifications of candidates. *See Storer* v. *Brown,* 514 U.S. 724, 730 (1974). State statutes in turn delegate some of this power to political parties via voter qualification statutes which require party affiliation or declaration of party preference as a prerequisite for voting in primaries. When there are affiliation or declaration statutes, the parties alone set the criteria. (In fact, this is a critical aspect of their constitutional rights to associate.) It is the party that determines the principles and philosophies which become the basis for the affiliation. The state accepts these party-established criteria for the affiliation and implements and effectuates them when it conducts the primary election.

In addition, all states have ballot access statutes. In states with presidential primaries, substantial requirements are placed on candidates running in those partisan primaries. *See generally,* Developments in the Law—Elections, 88 Harv. L. Rev. 1111, 1175-79 (1975). As in the case of affiliation and disclosure statutes, these state-imposed requirements on primary candidates are enforced

by the state. They vary from state to state and usually concern filing certain declarations. Of greatest significance, however, is the automatic ballot access granted by all states to candidates who ultimately obtain their party's nomination. The state sanctions the winners of the party's candidates selection process by granting them direct access to the general ballot. Through ballot access statutes the states rely upon political parties to perform part of the function of selecting candidates and gives them the force of law.

The Court has found state action in primary elections. *Terry* v. *Adams,* 345 U.S. 461, *reh. denied* 345 U.S. 1003 (1953); *Smith* v. *Allwright,* 321 U.S. 649 (1944); *Nixon* v. *Condon,* 286 U.S. 73 (1932); and *Nixon* v. *Herndon,* 273 U.S. 536 (1927). In these *White Primary Cases,* this Court announced that "any part of the machinery for choosing officials" becomes state action and subject to the Constitution's restraints. *Terry* v. *Adams,* 345 U.S. at 481; *Smith* v. *Allwright,* 321 U.S. at 664.

This state action can still be found in primary elections under two separate, currently viable, state action doctrines, the "public function doctrine," articulated in *Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345, 352 (1974) and *Flagg Bros.* v. *Brooks,* 436 U.S. 149, 158 (1978), and the "sufficient contacts" doctrine articulated in *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 721 (1961).

In *Jackson,* the Court identified two lines of the "sufficient contacts" doctrine, one emerging directly from *Burton,* which finds state action via a weighing of the totatlity of the circumstances forming a symbiotic relationship between the private activity and the state; and the second emerging from *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 176-77 (1972). The latter requires an examination of the specific point of contact between the state

and the challenged actvity which must reveal a sufficiently close "nexus", i.e., the state itself actually fosters and encourages the activity. Under both lines, primary elections—the point of interface between the state and the party—constitute state action.

In *Burton,* the Court summarized state action as follows:

> "The State has so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the 14th Amendment." 365 U.S. at 725.

The *Burton* test is satisfied if there is an interdependent, symbiotic relationship between the state and the private entity. *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 175 (1972).

The intertwining of the National Party and Wisconsin is obvious. The detailed regulation of primary elections "makes the party which is required to follow these legislative directions an agency of the state so far as it determines the participants in a primary election." *O'Brien* v. *Brown,* 409 U.S. 1, 13 (1972) (Marshall, J., dissenting on the issue of timeliness). The National Party's desire to have delegates representative of Wisconsin citizens coupled with the automatic access to the general election ballot awarded the nominee, demonstrate the interdependence of the National Party and Wisconsin. Mr. Justice Marshall's comments in his dissenting opinion in *O'Brien* are particularly appropriate:

> "For so long as the State recognizes and adopts the fruits of the primary . . . then the State has made that primary an integral part of the election process, and

> infused the primary with state action. . . ." *O'Brien*, 409 U.S. at 13.

Mr. Justice Marshall noted that where the presidential primary election is by law the first step in a process designed to select a candidate for President, the state is "intertwined in the process at every step" and thereby fulfills the *Burton* sufficiency of contacts/totality of circumstances standard for finding state action. *O'Brien*, 409 U.S. at 13. In *Gray* v. *Sanders*, 372 U.S. 368, 374 (1963), the Court utilized the totality of circumstances approach and found that extensive state involvement in the primary phase of an election constituted state action.

In *Moose Lodge*, the Court articulated the "nexus" analysis, an alternative variety of the "sufficient contacts" approach to state action. It requires a scrutiny narrowly focused on the specific aspect of private activity which is challenged. The state must be so intimately involved in the activity that the state itself could be said to have required, encouraged or enforced the activity and become a joint participant in it. It is not required that the activity originate with the state in order to be state action. The state must only have "significantly involved itself." 407 U.S. at 173. The nexus analysis does not take place in the abstract; it may proceed only in the context of the particular act or practice alleged to constitute state action.

The critical state action issue in this case goes to that particular moment in the presidential candidate selection process when the state conducts the presidential preference primary. At that moment, state-paid election officials and party-supplied, state-paid poll workers conduct the election. Herein lies the crucial *Moose Lodge* "nexus" between the state and party. It is the point of contact or interface.

The public function, state action doctrine is premised on the theory that when a private entity is engaged in activity of a public or quasi-public nature, state action is present. *Marsh* v. *Alabama,* 326 U.S. 401 (1946). Implicit in a public function finding is a recognition of the uniquely public purpose of an ostensibly private activity. The selection of the decision makers in a democratic society meets this test.

The Wisconsin Presidential Preference Primary is designed to serve a most fundamental interest of the state. The purpose and effect of the primary activities is preservation of the essence of the democratic system. As stated in Justice Pitney's concurring opinion, in which Justices Brandeis and Clarke joined, in *Newberry* v. *United States,* 256 U.S. 232 (1921):

> "[I]t seems to me too clear for discussion that primary elections and nominating conventions are so closely related to the final election, and their proper regulation so essential to effective regulation of the latter, so vital to representative government, that power to regulate them is within the general authority of Congress."

See also, Irish v. *Democratic Farmer-Labor Party of Minn.,* 287 F.Supp. 794, 804 (D. Minn. 1968) and *Maxey* v. *Washington State Democratic Comm.,* 319 F.Supp. 673 (W.D. Wash. 1970).

It seems beyond any serious dispute that the state has the power to regulate a private entity when it engages in a public function. Therefore, the state and Congress have the power to create and regulate primary elections[12] and

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[12] The full extension of the National Party's position is that political parties could nominate its state office candidates or elect delegates to the National Convention at a caucus even though a state created a closed primary.

to determine federal voter qualifications despite any party wishes to the contrary.

E. Cousins v. Wigoda is Inapplicable.

One of the principal questions is whether the Court in *Cousins* v. *Wigoda,* 419 U.S. 477 (1975) held that all state laws which affect the Presidential candidate selection process are overruled when the state laws conflict with National Party regulations. *Cousins* itself in the majority opinion recognized the legitimacy of states protecting the electoral process of its citizens. 419 U.S. at 489. Although the majority opinion limited that power when applied to the process by which candidates for national office are nominated, the concurring opinions specifically observed the important role of the states in regulating elections and these concurring opinions further observed that the Constitution itself directs states to choose electors who ultimately cast the votes for President and Vice President of the United States. 419 U.S. at 491, 495-497.

The facts of *Cousins* suggest that the principal concern of the Court was the injunction which was so broad in scope that the associational rights of Illinois citizens and the National Party were completely swept aside. *Cousins* should be viewed as a decision which voided an all-encompassing state court injunction.[13] The Court did not hold that National Party rules could overturn state or federal election laws which relate to the qualifications of voters. That is the specific point made in the concurring opinions.

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[13] Illinois law directly created a delegation to the National Convention which violated practically every objective of the National Party. Wisconsin law is only directed to voter qualifications. It does not regulate the actual election of delegates.

> "[R]espondents overlook the significant fact that the suffrage was exercised to elect delegates to a National Party Convention." 419 U.S. at 489.

Subsequent opinions interpreting *Cousins* have shed some light upon its meaning. In *Marchioro* v. *Chaney,* 442 U.S. 191 (1979), the Court held that states were empowered to direct major political parties to create central committees and to grant to these statutorily created committees certain limited but important functions. The Court said:

> "The requirement that political parties form central or county committees composed of specified representatives from each district is common in the laws of the States. These laws are part of broader election regulations that recognize the critical role played by political parties in the process of selecting and electing candidates for state and national office. The State's interest in ensuring that this process is conducted in a fair and orderly fashion is unquestionably legitimate; 'as a practical matter there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.' *Storer* v. *Brown,* 415 U.S. 724, 730. That interest is served by a state statute requiring that a representative central committee be established, and entrusting that committee with authority to perform limited functions, such as filling vacancies on the Party ticket, providing for the nomination of presidential electors and delegates to national conventions, and calling state-wide conventions. Such functions are directly related to the orderly participation of the political party in the electoral process." 442 U.S. at 195-197.

With respect to *Cousins,* the Court commented on its scope in a footnote at the end of the opinion as follows:

> "*Cousins* v. *Wigoda,* 419 U.S. 477, upon which appellants place their primary reliance, does not support their claim here. In *Cousins,* unlike this case, there was a substantial burden on associational freedoms. This fact alone distinguishes the two cases and renders *Cousins* inapposite." 442 U.S. at 199 n. 15.

Likewise, in *Buckley* v. *Valeo,* 424 U.S. 1 (1976), the Court, in upholding most aspects of the Federal Election Law, cited *Cousins* in the following passage:

> "As the general discussion in Part I-A, *supra,* indicated, the primary First Amendment problem raised by the Act's contribution limitations is their restriction of one aspect of the contributor's freedom of political association. The Court's decisions involving associational freedoms establish that the right of association is a 'basic constitutional freedom,' *Kusper* v. *Pontikes,* 414 U.S. at 57, that is 'closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.' *Shelton* v. *Tucker,* 364 U.S. 479, 486 (1960). See, e.g., *Bates* v. *Little Rock,* 361 U.S. 516, 522-523 (1960); *N.A.A.C.P.* v. *Alabama, supra,* at 460-461; *N.A.A.C.P.* v. *Button,* 371 U.S. at 452 (Harlan, J., dissenting). In view of the fundamental nature of the right to associate, governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.' *N.A.A.C.P.* v. *Alabama, supra,* at 460-461. Yet, it is clear that '[n]either the right to associate nor the right to participate in political activities is absolute.' *C.S.C.* v. *Letter Carriers,* 413 U.S. 548, 567 (1973). Even a '"significant interference"' with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms. *Cousins* v. *Wigoda,* 419 U.S. at 488; *N.A.A.C.P.* v. *Button, supra,* at 438; *Shelton* v. *Tucker, supra,* at 488." 424 U.S. at 24-25.

It is abundantly clear that states indeed have significant power to regulate all elections. *Cousins* does not destroy that power. *Buckley,* citing *Cousins,* held that associational rights are not absolute. They are subject to narrowly drawn regulations which do not unduly interfere with important associational privileges as long as the

regulation advances a recognized legitimate state interest. Thus, it appears that the *Cousins* decision was principally prompted by the fact that a state court had attempted to directly prevent certain persons from becoming delegates to a national convention. *Cousins* did not hold that states were completely powerless to regulate voter qualification in Presidential preference primaries.

This was the precise holding of Judge Frankel in *Fallon* v. *State Board of Elections of the State of New York,* 408 F.Supp. 636 (S.D. N.Y. 1976). The court stated in the body of its opinion:

> "Read most liberally in plaintiffs' favor, *Cousins, supra,* held no more than that the policy of a national political party in *setting qualifications for delegates* to its convention may, in some circumstances, prevail over contrary state law." 408 F.Supp. at 638. (Emphasis supplied).

The court's footnote in conjunction with that statement is even more to the point:

> "A fairer reading of *Cousins* probably does not go even this far. There, a state court enjoined the plaintiff-delegates who were not elected in the state primary from being seated at the 1972 National Democratic Convention after the Credentials Committee had refused to seat those delegates who were elected in the primary on the ground that certain slate-making procedures required by the Party's charter were not complied with. The plaintiffs appealed to the Supreme Court and took their seats in violation of the injunction. While contempt proceedings were pending, the Supreme Court reversed the state injunction, holding that it violated plaintiffs' right of freedom of political association. As Justice Rehnquist pointed out in his concurring opinion, the operation of the state injunction 'was as direct and severe an infringement of the

> right of association as can be conceived.' 419 U.S. at 491-92. Whether the *Cousins* decision can thus be read to hold that any national party rule overrules a contrary state election requirement is at best questionable." 408 F.Supp. at 638 n. 3.

Cousins is hardly an all-encompassing decision which sweeps away all state regulation of those parts of the electoral process which relate to Presidential candidate selection. The Court was primarily concerned with a broad injunction which "was a direct and severe infringement" upon fundamental associational rights and privileges. *Cousins,* 419 U.S. at 491-92. Even if the Wisconsin law is found to affect some associational right of the National Party, this narrowly drawn state regulation is properly enforceable. States still maintain their historic role of insuring that elections are "conducted in a fair and orderly fashion." The Wisconsin Open Primary law is not unconstitutional merely because it conflicts with some rule of the Democratic Party of the United States.

III.

IF THE STATE HAS THE POWER TO CONDUCT AN OPEN PRIMARY, IT HAS THE POWER TO MAKE THE RESULTS OF THE PRIMARY EFFECTIVE.

Perhaps the real issue in this case is not whether Wisconsin can conduct an open primary, but rather whether it can make the results of the open primary binding upon Wisconsin delegates to the National Convention. In this respect, the mandate of the Wisconsin Supreme Court is also very limited.

Unlike *Cousins* v. *Wigoda,* the Supreme Court of Wisconsin did not prohibit the National Party from seating any particular delegation. The Wisconsin law and the

Wisconsin Supreme Court did not regulate the composition of the Wisconsin delegation. All that the Wisconsin Supreme Court directed was that no delegation could be refused credentials at the Democratic National Convention solely on the ground that the apportionment of the delegation was in accordance with the results of the Wisconsin Open Primary. This is a very narrow and closely drawn judicial requirement which merely enforces the limited purposes of the Wisconsin law. It merely makes that law effective without any actual impairment of the National Party's First Amendment rights.

A state has the power to enforce its election laws. The Court stated in *Storer* v. *Brown, supra*:

> "As we indicated in *Rosario,* the Constitution does not require the State to choose ineffectual means to achieve its aims." 415 U.S. at 736.

The Court was reaffirming its approval of the opinion of the Court of Appeals in *Rosario* v. *Rockefeller,* 458 F.2d 649, 654 (2nd Cir. 1972) when it stated:

> "In requiring that the State use to a proper end the means designed to impinge minimally upon fundamental rights, the Constitution does not require ineffectual means." See *Rosario* v. *Rockefeller,* 410 U.S. 752, 762 n. 10 (1973).

Likewise, Wisconsin is not required to helplessly hope that the National Party will honor Wisconsin law. A closely drawn injunction makes the Wisconsin law effective in a manner which does not impair any First Amendment right claimed by the National Party.

CONCLUSION

On the basis of the foregoing, it is respectfully requested that the Court affirm the judgment and mandate of the Wisconsin Supreme Court.

Dated: October 8, 1980.

Respectfully submitted,

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APPENDIX

APPENDIX

(Quoted from Research Bulletin, 75-RB-1, at 7-8)

Chapter 451, Laws of 1903, provided that all candidates for partisan elected office would be chosen in primary elections. Although this law would have allowed the popular election of delegates to national political conventions, this was not specifically required. As remains true today, this was an open primary.

Chapter 369, Laws of 1905, specifically required that delegates to national political party conventions be elected in primaries. Under this law, prospective delegates stated no preference either on the nomination papers or the ballot for any prospective presidential candidate. In other words, the voter cast his ballot for individual delegates, not for any preferred presidential candidate.

Chapter 512, Laws of 1907, provided that alternates for the popularly elected delegates to the national political conventions were to be selected by the statutory central committees of the Wisconsin political parties, rather than from the runners-up in the delegate election.

Chapter 300, Laws of 1911, added the "presidential preference" feature to Wisconsin's presidential primary. In addition to voting for the delegates to the national political conventions, voters were also permitted at the same election to express a preference for the various possible contenders for presidential nomination. However, the law said nothing as to whether the results of

the presidential preference ballot would bind or commit the delegates elected at the same time, and there was nothing on the ballot which linked the delegate selction process with the presidential preference ballot. The law specifically stated that the names of presidential nomination aspirants could be placed on the ballot without their consent. Oregon adopted the presidential preference plan in 1910, followed in 1911 by Wisconsin, Nebraska, New Jersey and North Dakota.

Chapter 22, Laws of the Special Session of 1912, provided that candidates for the positions of delegate to the national conventions could identify themselves on the ballot with the name of a particular presidential aspirant or with a particular principle. However, there was still no direct connection between a vote for a presidential contender in the presidential preference contest and a vote for a candidate for delegate linked with the presidential contender's name. The delegate was not legally bound, as he is today, to support a particular candidate at the party's national convention. In addition, the law did not permit delegate election by "slates" of candidates, preferring a certain presidential candidate. All delegates had to be voted for individually.

Thus, the Attorney General held in 1924 that a "presidential preference primary and national party convention delegate ballot marked by (the) voter for one of (the) candidates for president and with no other marks cannot be counted as a vote for candidates who appear on (the) ballot designated as favoring such candidate for president. Candidates for delegates must be voted for separately and individually." (13 Atty. Gen. 184)

Chapter 139, Laws of 1933, took legal notice of the fact that it was each national political party's prerogative to

determine the number of convention votes allocated to each state. The 1905 primary law had provided for the election of a specific number of delegates (2 per congressional district, 4 at large) from the Wisconsin party organizations to the national convention. The law was changed so that the required number of delegates would be elected in the primary.

Chapter 406, Laws of 1949, established a direct link between the presidential preference ballot and delegate selection by providing for the election of candidate-committed slates of delegates. The law restructured the ballot form to list delegates' names under a candidate's name and limited the number of delegates per candidate to the number to be elected. Individuals could become delegates either by filing nomination papers as in the past or by being on a certified slate of candidates entered by the presidential candidate. The 1949 law also made another amendment to the presidential primary statutes. At the time that a proposed presidential candidate entered a slate of delegates pledged to him the law required him to sign a sworn affidavit stating that he intended to become a candidate for the presidential nomination at the national convention for which the delegates were being selected. In addition, the law required the delegate to sign an affidavit stating that he would support the candidate on the first ballot and upon all additional ballots unless released by the candidate or unless the candidate received less than ten percent of the convention vote on any ballot.

Chapter 689, Laws of 1951, required that a presidential candidate's certified list of delegates was to take preference over delegates filing nomination papers.

Chapter 90, Laws of 1967, eliminated the names of prospective delegates from the primary ballot. Delegates were to be chosen under the present system described at the beginning of this section. The law also gave the voter the option of voting for "none of the names shown" as a means of indicating his dislike of all potential candidates listed on the party ballot. It was believed that this would reduce the frequency of crossover voting by allowing voters to protest the absence of an acceptable candidate on their party's ballot. Chapter 90 also increased from one-tenth to one-third the share of convention votes that a candidate must receive on any single ballot in order to maintain the commitment of delegates pledged him under the Wisconsin primary.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1631

DEMOCRATIC PARTY OF THE
UNITED STATES OF AMERICA and
DEMOCRATIC NATIONAL COMMITTEE,
Appellants,

vs.

STATE OF WISCONSIN ex rel.
BRONSON C. LA FOLLETTE
and DEMOCRATIC PARTY OF WISCONSIN,
Appellees.

ON APPEAL FROM THE
SUPREME COURT OF WISCONSIN

BRIEF OF APPELLEE, STATE OF WISCONSIN

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1631

DEMOCRATIC PARTY OF THE
UNITED STATES OF AMERICA and
DEMOCRATIC NATIONAL COMMITTEE,
Appellants,

vs.

STATE OF WISCONSIN ex rel.
BRONSON C. LA FOLLETTE
and DEMOCRATIC PARTY OF WISCONSIN,
Appellees.

ON APPEAL FROM THE
SUPREME COURT OF WISCONSIN

BRIEF OF APPELLEE, STATE OF WISCONSIN

QUESTION PRESENTED

The State disagrees with the appellants' statement of the question presented.

The question presented is whether the State may, consistent with its long-established constitutional power to regulate the integrity of the electoral process to advance the interests of its citizens, choose to enable Democratic voters in a presidential primary election to

select their party privately and without a public declaration of party loyalty.

The State cannot agree with the appellants' statement of the second question. Appellants, hereafter collectively the "National Party," state the second question to be whether the State can prevent the National Party from determining the qualifications of delegates to its national convention.

The reason this second issue is not presented is that the "Wisconsin statute explicitly states that '[t]he method of selecting the delegates or alternates shall be determined by the state party organization.' Sec. 8.12 (3) (b), Stats." *State ex rel. La Follette v. Democratic Party,* 93 Wis. 2d 473, 485, 287 N.W.2d 519, 523 (1980), Appendix of Appellant at 6a (hereinafter A-Ap.). The Wisconsin law "does not govern the selection of or qualification of delegates to the national convention." 93 Wis. 2d at 525, 287 N.W.2d at 542, A-Ap. at 41a. Indeed, the parties stipulated that delegate selection "is under the control and direction" of the Democratic Party of Wisconsin (hereinafter the "State Party"). Stip., par 19, Joint Appendix at 27 (hereinafter Jt. App.).

STATEMENT OF THE CASE

What characterizes the Wisconsin system as an "open" primary is that the "voter is not required to declare publicly a party preference or to have that preference publicly recorded. Each voter makes a choice of party in the privacy of the voting booth." 93 Wis. 2d at 485, 287 N.W.2d at 523, A-Ap. at 6a.

The Wisconsin voter votes for candidates, not delegates. The State Party chooses the delegates after the primary. The sole function of the primary is to apportion the number of delegates among the Party's candidates in accord with the results of the primary. 93 Wis. 2d at 485-86, 287 N.W. 2d at 523-24, A-Ap. at 6a-7a.

The National Party's Rule 2A provides that "Democratic voters only who publicly declare their party preference and have that preference publicly recorded" may participate in the "delegate selection process." A-Ap. at 8a. In July, 1979, the Compliance Review Commission of the National Party rejected the delegate selection plan of the Democratic Party of Wisconsin because "participation in the April 1, 1980 Wisconsir presidential preference primary is not restricted to Democratic voters who publicly declare their party preference and have that preference publicly recorded," and the State Party had presented no alternative. Stip., par. 14, Jt. App. at 25, 93 Wis. 2d at 489, 287 N.W.2d at 525.

Under National Party rules, no Wisconsin delegation was to be seated at the national convention unless in compliance with Rule 2A. Stip., pars. 11, 17, Jt. App. at 25, 26.

The State commenced this action as an original action before the Wisconsin Supreme Court. The State named both the National Party and the State Party as respondents. The State Party responded by agreeing that State law validly may be applied against it and the National Party. The State Party cross-claimed against the National Party, asking the court to order the National Party to recognize its delegation selected in accord with Wisconsin law. The National Party defended on the ground that the Wisconsin law offends the first and fourteenth amendments to the United States Constitution.

The Wisconsin Supreme Court, after receiving briefs, hearing oral argument, and reviewing the parties' stipulated facts, entered its decision and judgment on January 19, 1980. It concluded that the National Party had failed to show that its requirement of a public declaration of Party affiliation served to

keep non-Democrats from participating in the Democratic primary. "Both the closed and open primary depend on the honesty and integrity of the voters." 93 Wis. 2d at 510, 287 N.W.2d at 535, A-Ap. at 27a-28a. The National Party's own evidence showed there are no differences in results or representativeness in open as opposed to closed primaries. 93 Wis. 2d at 507-08, 287 N.W.2d at 534, A-Ap. at 25a-26a. Since the required public declaration of Party loyalty only deters voting, the court concluded the essential difference between Wisconsin's open primary and a closed primary is that in the former more people vote on the ballot of their party, not that more non-Democrats vote on the Democratic ballot. 93 Wis. 2d at 511-12, 287 N.W.2d at 535-36, A-Ap. at 29a.

As a result, the court concluded that the open primary law, by granting voters a right of privacy in party selection, does not impose a substantial burden on the associational rights of the National Party, and that any burden "appears speculative, remote and minimal." 93 Wis. 2d at 511, 287 N.W.2d at 536, A-Ap. at 29a.

The court also found that the State has a compelling interest in maintaining its open primary even if there were a substantial burden on the National Party's associational freedoms. The State's interest, the court said, is to preserve the overall integrity of the electoral process by providing secrecy of the ballot, thereby encouraging increased voter participation and ensuring that the primary itself and the political party's participation in the primary are conducted in a fair and orderly manner. 93 Wis. 2d at 512, 287 N.W.2d at 536, A-Ap. at 30a. The interest of privacy of the ballot is "'fundamental in a free society.'" 93 Wis. 2d at 512, 287 N.W.2d at 536, A-Ap. at 30a. Voting is encouraged, which in turn fosters democratic government. 93 Wis. 2d at 512-13, 287

N.W.2d at 536, A-Ap. at 31a. Further, a public declaration would interfere with the State's entire electoral system which is based on secrecy of the ballot and non-disclosure of party preference in the case of hundreds of partisan and nonpartisan offices in the state. 93 Wis. 2d at 513-14, 287 N.W.2d at 537, A-Ap. at 31a-32a. And the open primary is deeply engrained in Wisconsin traditions and culture: for almost the whole of the 20th century it has "functioned well in the state of Wisconsin for the citizens and for the political parties." 93 Wis. 2d at 514, 287 N.W.2d at 537, A-Ap. at 32a.

Having concluded that the open primary law is constitutional, the court turned to a remedy. Unlike the situation in *Cousins v. Wigoda,* 419 U.S. 477 (1975), the Attorney General and the State Party "are not arguing that the National Party must seat any delegates selected by the State Party in accordance with Wisconsin law." Rather, they sought an order that the National Party "cannot refuse to seat the Wisconsin delegation on the sole ground that the delegation was apportioned by utilizing the results of a primary in which no public declaration of party preference was required." 93 Wis. 2d at 552, 287 N.W.2d at 541, A-Ap. at 38a-39a. The court entered judgment accordingly. 93 Wis. 2d at 525-26, 287 N.W.2d at 543, A-Ap. at 42a.

SUMMARY OF ARGUMENT

Two interests fundamental to our system of federal government are at issue here. The first is the authority of the states conferred by the United States Constitution article II section 1: "Each state shall appoint, in such manner as the legislature thereof shall direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled."

This authority is "plenary," *McPherson v. Blacker,* 146 U.S. 1, 35 (1892), and "extensive." *Williams v. Rhodes,* 393 U.S. 23, 29 (1968). The states' authority to determine the process of selecting electors has been recognized to include essential steps in that process. Thus, primary elections are an "integral part of the entire election process." *Storer v. Brown,* 415 U.S. 724, 735 (1974). The states' authority extends to the registration and qualification of voters as well as to the selection and qualification of candidates.

Further, the states are free to choose to exercise this authority to restrict or expand access to candidates and voters within broad limits.

> [A]ppellants ... assert that ... substantial burdens on the right to vote or to associate for political purposes are constitutionally suspect and invalid under the First and Fourteenth Amendments and under the Equal Protection Clause unless essential to serve a compelling state interest. These cases, however, do not ... invalidate[] every substantial restriction on the right to vote or to associate. Nor could this be the case under our Constitution where the States are given the initial task of determining the qualifications of voters .... Moreover, as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. In any event, the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of

> voters, and the selection and qualification of candidates.

Storer v. Brown, 415 U.S. at 729-30.

Thus, although this Court has had occasion to review only restrictions on candidate and voter access, the explicit constitutional authority vested in the states to preserve the integrity of the voting process and secure the rights of its citizens sanctions "substantial" regulation either to restrict or expand voter access.

Wisconsin has exercised its authority to expand voter access by guaranteeing voter privacy in the presidential primary.

The second interest at issue is the National Party's interest in controlling its internal affairs. That interest simply is not threatened in this case. First, the process of delegate selection under Wisconsin law is under the exclusive control of the Democratic Party. Stip. par. 19, Jt. App. at 27. The sole function of the Wisconsin Open Primary Law is to determine Democratic candidate strength among persons who vote Democratic. Thus, this case concerns only the unique public function of the National Party in selecting a person likely to be President in an essential part of the presidential selection process: it is a voting rights case, not a delegate selection case.

This is the "significant fact" that shaped this Court's analysis in *Cousins v. Wigoda,* 419 U.S. 477, 489 (1975), and distinguishes the instant case. In *Cousins,* "suffrage was exercised at the primary election to elect delegates to a National Party Convention." *Id.* However, as noted, under Wisconsin law *no* delegates are selected by Wisconsin voters. Thus, the National Party's interests affected and the weight to be accorded those interests are other than those discussed in *Cousins.*

Second, the National Party has not demonstrated that any of its own legitimate interests are burdened by Wisconsin's Open Primary Law. It has no valid constitutional interest in excluding principled supporters of a Democratic Party candidate on the basis that the supporter has previously, or ever, supported other or no party candidates. Further, there is no factual support for the National Party's fear of unprincipled votes for its candidates, *i.e.*, raiding. The evidence is clear: there is none.

The National Party has made no showing of anything more than a speculative burden on its associational interests. At most, Wisconsin's Open Primary Law requires a demonstration of a rational basis. *Storer v. Brown,* 415 U.S. 724 (1974). This is particularly so where there is an explicit grant of authority to the state to regulate concerning the subject matter. *See, Pruneyard Shopping Center v. Robins,* — U.S. —, 100 S. Ct. 2035, 2040 (1980).

Wisconsin's interests not only are valid, they are compelling. Most importantly, by choosing not to require a public declaration of party affiliation, Wisconsin stimulates public participation in the process of choosing a President. This guarantee of privacy of ballot in party selection as well as candidate selection recognizes the interests of formal Democratic Party members as well as all voters in privacy of association. Further, Wisconsin's system of strictly local and non-partisan contests at its spring election is served by excluding a separate partisan declaration and partisan voting procedure.

Recognizing Wisconsin's authority to guarantee the privacy of the vote would not disrupt the National Party's continuing efforts to broaden its base of delegate representation. As noted, *no* rule related to individual delegate selection is at issue here. The Party

selects the delegates and is free to develop or abandon rules on that subject.

Finally, Wisconsin has no alternative means available to guarantee privacy of voting association short of the guarantee embodied in its open primary. To effectuate the will of its citizens, it could do no less.

ARGUMENT

I. States Are Vested With Broad Discretion By Article II Section I Of The Constitution To Determine Who May Vote In Presidential Primaries.

This case concerns the power of the state to guarantee voting privacy in a presidential primary. Each state is vested by article II section I of the Constitution/[1] with the authority to determine voter qualifications and the procedure whereby its citizens choose presidential electors. "The right to vote ... protected [is] the right to vote as established by the laws and constitution of the state." *McPherson v. Blacker,* 146 U.S. 1, 39 (1892); *Cousins v. Wigoda,* 419 U.S. 474, 495 (1975) (Rehnquist, J., concurring).

"There, of course, can be no question but that this section does grant extensive power to the States to pass laws regulating the selection of electors." *Williams v. Rhodes,* 393 U.S. 23, 29 (1968). Thus, a state's role in our federal/[2] system has been

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/[1]"Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the Congress." U.S. Const. art. II sec. 1.

/[2]A state's authority vested by article II sec. 1 (selection of presidential electors) and article I sec. 2 (selection of members of

characterized as "under our Constitution ... States are given the initial task of determining the qualification of voters." *Storer v. Brown,* 415 U.S. 724, 729 (1974). This power extends as well to the "registration and qualification of voters and the selection and qualification of candidates." *Id.* at 730. It is, therefore, the state's prerogative to determine how it exercises its discretion to afford its citizens the degree of access it deems proper./[3]

The state's power is no less extensive in a presidential primary. "As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made." *Newberry v. United States,* 256 U.S. 232, 286 (1921) (Mr. Justice Pitney, dissenting in part). *Cf. Cousins v. Wigoda,* 419 U.S. at 495 (concurring opinion). "The direct party primary ... is not merely an exercise or warm-up for the general election but an integral part of the entire election process." *Storer v. Brown,* 415 U.S. at 735. This Court expressly has acknowledged the power of the states to regulate voting in primaries to preserve the integrity of each state's legislatively determined interests. *Rosario v. Rockefeller,* 410 U.S. 752 (1973), *reh. den.* 411 U.S. 959 (1973); *Kusper v. Pontikes,* 414 U.S. 51 (1973).

Although these principles of our system of government have frequently and pointedly been recognized by this Court,/[4] appellants attempt to ignore their

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congress) has been treated as having similar contours. *See, e.g., Storer v. Brown,* 415 U.S. 724, 730 (1974); *Marchioro v. Chaney,* 442 U.S. 191, 196 (1979).

/[3]A state is free to choose to abolish popular election and use some other method for picking a president. *McPherson v. Blacker,* 146 U.S. 1, 35-36 (1892).

/[4]*See, e.g., Kusper v. Pontikes,* 414 U.S. 51, 57 (1973); *Rosario v. Rockefeller,* 410 U.S. 752 (1973), *reh. den.* 411 U.S. 959 (1973); *Bullock v. Carter,* 405 U.S. 134, 141 (1972); *Gray v. Sanders,* 372 U.S. 368, 379 (1963); *United States v. Classic,* 313 U.S. 299, 311

import by asserting two propositions: first, that this Court in *Cousins v. Wigoda,* 419 U.S. 477 (1975), has "barred" the State of Wisconsin from implementing its open primary law, National Party's Brief at 19, and, second, that the impact of Wisconsin's law is so severe that its associational rights have been "struck to the core." *Id.* at 32. Appellees will respond to appellants' second proposition in section III of this brief. The first, because of the heavy reliance placed upon it by appellants and its fundamentally flawed premise, will be responded to here.

The critical distinction between the facts in *Cousins* and the instant case is that the selection of individual delegates to the National Party's convention was at stake in *Cousins*/[5] and is not at stake here. In *Cousins* the National Party and this Court were properly concerned that persons who write the platform, vote on party structure and procedure as well as represent the interests of the voters in myriad parochial and national matters be only Party members chosen by only Party members and not mandated by statute or court order to be seated at a party's convention. None of these concerns, contrary to the assertions of appellants, are validly raised in the instant case.

All the essential facts determining the selection of delegates have been stipulated to by the parties:

(1941); *Mason v. Missouri ex rel. McCaffery,* 179 U.S. 328 (1900); *In re Green,* 134 U.S. 377 (1890); *McPherson v. Blacker,* 146 U.S. 1, 28, 35-36, 39 (1892).

/[5]The "significant fact" that individual "delegates to a National Party Convention" (419 U.S. at 489) were selected in an election and were specifically subject to the Illinois court's injunction was frequently noted by the Court. *Cousins* concerns the "selection of delegates to the National Party Convention." *Id.* at 491.

> Under *both* the Open Primary Law and the alternative caucus plan pursuant to the rules of the DNC: (1) the process for selecting the delegates is under the control and direction of the State Party; (2) only Democrats and those who subscribe to the general progressive principles of the State Party may participate in selecting delegates; and (3) a committed delegation results, *i.e.*, delegates to the National Convention are bound to support a particular candidate.

Stip. par. 19, Jt. App. at 27.

That *Cousins* was a delegate selection case which was decided on considerations related to intruding into that process is patent. That this case does not involve that central issue has, literally, been stipulated by all parties.

Appellants' error is compounded by casting the relief afforded by the court below as "more intrusive" than the order at issue in *Cousins*. It is not. In *Cousins* the state court had enjoined nonelected delegates from so much as asserting their delegate status before the convention, notwithstanding the Court's conclusion that election of delegates under Illinois law did not entitle the elected person to be seated. 419 U.S. at 488. The Wisconsin Supreme Court narrowly tailored its relief to prevent any misrepresentation of its citizens by ordering that no one may be "disqualified as [a delegate] solely by reason of the apportionment ... as required by the Wisconsin statutes." 93 Wis. 2d at 526, 287 N.W.2d at 543, A-Apee. at 42a./[6]

/[6]As Mr. Justice Powell stated in concurrence and dissent in *Cousins v. Wigoda*, 419 U.S. 477, 497 (1975), states have power to enjoin persons from sitting as delegates representing districts in the state.

Appellants reveal their claim to absolute power, to the exclusion of any other interests no matter how legitimate, by their claim that the Wisconsin Supreme Court's relief sorely intrudes on their prerogatives. Assume Wisconsin had a law saying the state and national parties may not refuse to seat a delegate because of his or her race or sex. The logical result of appellants' position is that *Cousins* forecloses such "intrusion." *Cousins*, however, did not foreclose all state regulation. It foreclosed a particular regulation, namely, undue interference with the choice of delegates.

Given these distinctions, it is proper first to analyze the state's authority to regulate elections before examining the minor effect Wisconsin law has on the National Party's private associational activities.

II. A State Is Free To Exercise Its Article II Section I Authority To Guarantee Access To Both Public And Private Party Identifiers.

The National Party appellants assert that their interests are paramount and argue to this Court that state primary laws must either protect their interests or fall. This critical and essential thesis of the National Party is invalid. They proceed from the assumption that any interference with their asserted interests may be sustained only if a "compelling state interest" is demonstrated. National Party Brief at 19. In fact the National Party neither possesses the interests claimed nor is entitled to require a compelling state interest to sustain the state's primary regulatory laws. A proper legal analysis is possible only once it is understood that the National Party's interests are not absolute. Further, upon proper definition of the

National Party's interests and consideration of competing interests, it will be apparent that Wisconsin citizens have the authority to choose to conduct their state's primary election as they have for over seventy-five years.

At the outset it is important, therefore, carefully to define the interest the National Party actually represents and those it seeks to adopt for purposes of this proceeding. The National Party in the instant case is selecting a candidate for President of the United States. *No other function* of the Party is at issue. Platform writing, party structure and procedure as well as political strategy are all exclusively in the hands of persons who must be Party members selected by Party members. *See,* Wis. Stats. sec. 8.12 (3) (b)/[7]; Stip. par. 19, Jt. App. at 27. It is only this national public funciton of one of the two major political parties that is at issue. This is a critical distinction between the instant case and *Cousins v. Wigoda,* 419 U.S. 474 (1975). To distinguish and identify this single function of unique character at issue it will be referred to herein as the National Party's unique public function.

The National Party is not simply a "private club." 93 Wis. 2d at 515, 287 N.W.2d at 538, A-Ap. at 33a. Its interest is not, therefore, that of the National Association for the Advancement of Colored People struggling to carve out an identity and awaken the conscience of a nation. It is true that both the NAACP and the National Party are organizations seeking funds, building coalitions, resisting opposition, and pursuing organizational goals. *Cf. NAACP v. State of Alabama,* 357 U.S. 449 (1958) (cited by National Party at 18). The NAACP does not, however, at a single

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/[7]Wisconsin statutes sec. 8.12 (3) (b), provides in relevant part: "The method of selecting the delegates ... shall be determined by the state party organization."

meeting every four years select a person who is likely by virtue of his or her selection to be the next President of the United States.

Cases therefore which foster and protect exclusively private associations in their internal and often parochial activities are not apposite. The private functions of the National Party are not threatened or at issue.

That the unique public function of the National Party constitutionally requires greater governmental supervision is a concept of fundamental importance to twentieth century constitutional law. To the extent that an otherwise private entity performs a function that participates in or shares the governmental function of the state, its actions are thereby circumscribed by constitutional principles and may be regulated to that end./[8] Rights stemming from private ownership of property/[9] to first amendment exercise/[10] are subject to this principle depending on the circumstances of the action taken. Therefore, far from precluding any state regulation, the National Party's acts performed as they are at the very heart of the process of representative government are to that degree subject to appropriate regulation.

/[8]*See generally,* the *White Primary Cases: Nixon v. Condon,* 286 U.S. 73 (1932); *Smith v. Allwright,* 321 U.S. 649 (1944); *Terry v. Adams,* 345 U.S. 461 (1953, *reh. den.* 345 U.S. 1003 (1953). *See also, State of Georgia v. National Democratic Party,* 447 F.2d 1271, 1275 n. 5 (D.C. Cir. 1971), *cert. den.* 404 U.S. 858 (1971); *Nixon v. Herndon,* 273 U.S. 536 (1927).

/[9]*See, e.g., Marsh v. Alabama,* 326 U.S. 501 (1946).

/[10]*Marchioro v. Chaney,* 442 U.S. 191, 196 (1979). *See also, Red Lion Broadcasting Co. v. F.C.C.,* 395 U.S. 367 (1969); *Columbia Broadcasting System v. Democratic National Committee,* 412 U.S. 94 (1973).

Appellants turn these well-known principles on their head to say that because they perform such a critical part in the public's business they are beyond regulation by government. More particularly, they turn to this Court's own language in *Cousins v. Wigoda* to say that the first amendment associational freedoms immunize the process of selecting a candidate from governmental intrusion.

The majority's language in *Cousins* simply cannot bear the weight appellants would put on it. The language at most is *obiter,* this Court having expressly narrowed the issue to the question of delegate selection. 419 U.S. at 483 and n. 4. *See, Fallon v. St. Bd. of Elections of St. of New York,* 408 F. Supp. 636, 638, and n. 3 (S.D. N.Y. 1976). Second, this Court subsequently has so confined *Cousins* in language recognizing the power of the states to regulate the political parties because of the overriding public interest in electoral integrity. *See, Buckley v. Valeo,* 424 U.S. 1, 24, 25 (1976). Most recently, in *Marchioro v. Chaney,* 442 U.S. 191 (1979), this Court upheld state regulation of political parties in recognition of the "critical role played by political parties in the process of selecting and electing *candidates* for state and national office." *Id.* at 196 (emphasis added). *Cousins* was expressly distinguished as involving a state incursion into intraparty matters protected by freedom of association. *Id.* at 199. Finally, the language of the majority is overbroad, as the concurring Justices correctly noted.

Further, in asserting the interests of individual members of its organization, the National Party again asserts interests it does not possess and ignores contrary interests of equal weight and dignity. Clearly, a large number of citizens wish to associate and conduct their affairs in the manner the National Party does. Contrary to the Party's assertion, however, that

does not end the analysis. There are other groups of persons with competing interests who have the right to be heard. Constitutional law requires that their interests be considered.

The National Party concedes that its rule would exclude honest Republicans, Independents, minor party adherents, and those Democrats not wishing publicly to declare and have recorded that they were voting for a Democratic Party candidate in an election. Do these citizens have rights in the essential steps of the process of selecting the President? How are they to be considered and weighed and by whom? The National Party denies that these citizens have any rights and claims the unrestricted authority to set the terms of their participation in the primary process.

The facts are that non-major party adherents are increasing in number/[11] and are actively participating in the political process./[12] Conversely, publicly declared adherents of both major parties are a decreasing proportion of the American body politic./[13] The absolute number of citizens disenfranchised by the National Party rule and ignored in its legal analysis is the vast majority of the electorate, and the disproportion is increasing.

These facts are relevant not because the State of Wisconsin believes that more people aggregate to more

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/[11]The Gallup Opinion Index, Report No. 131, June, 1976, as reported in Comment, *Open vs. Closed Primaries: A Dilemma in the Illinois Election Process*, 1977 So. Ill. U.L. Rev. 210, 229; N. Nie, S. Verba and J. Petrocik, *The Changing American Voter* 47, 58 (Cambridge, 1976); G. Pomper, *Voter's Choice: Varieties of American Electoral Behavior 18-41 (New York, 1975).*

/[12]*Id;* W. Burnham, *Critical Elections and the Mainsprings of American Politics* 130 (New York, 1970).

/[13]*Id.*

rights, but because Wisconsin is free to choose/[14] and weigh the factors discussed *infra* in the context of the needs and practices of its citizens. As good public policy is debated, the practical context of actual voter sentiment may properly inform the Legislature and others vested with the responsibility to make such determinations.

The open primary is deeply woven into the fabric of Wisconsin's electoral processes. Nondisclosure of party preference extends to choosing presidential party candidates, partisan state and local candidates, and hundreds of nonpartisan executive, legislative, and judicial officers on the state and local level. 93 Wis. 2d at 514, 287 N.W.2d at 537, A.Ap. at 31a-32a. The local electorate is convinced of its abiding essential value. On September 5, 1979, by a unanimous vote of its senate and a 92-1 vote of its assembly, the Wisconsin Legislature by joint resolution reaffirmed the "firm and enduring commitment of the people of Wisconsin

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/[14] In the past the Court has upheld congressional actions designed to increase the overall level of political discourse but affecting adversely the First Amendment interests of some individuals. *Buckley v. Valeo, supra,* 424 U.S. 1, 64-68, 96 S.Ct. 612, 656-658, 46 L.Ed.2d 659 (1976) (disclosure requirements); *CSC v. Letter Carriers,* 413 U.S. 548, 564-566, 93 S.Ct. 2880, 2889-2891, 37 L.Ed.2d 796 (1973); *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 392-395, 89 S.Ct. 1794, 1807-1809, 23 L.Ed.2d 371 (1969). In *Letter Carriers* we indicated specifically that the First Amendment freedoms of federal employees could be limited in an effort to further the functioning of the democratic process. I do not believe that local legislative judgments as to what will further the democratic process in light of local conditions should receive less weight than these congressional judgments. Surely that should be the case until we have a record, if one could be created, showing the fears of the ... [plaintiffs] to be justified.

Elrod v. Burns, 427 U.S. 347, 386 n. 9 (1976) (Burger, C.J., Powell, Rehnquist, J.J., dissenting).

to the open presidential preference primary law as an integral element of Wisconsin's proud tradition of direct and effective participatory democracy." Jt. App. at 75-78. And on September 14, 1979, a bill to create a modified closed primary was soundly defeated in committee. 93 Wis. 2d at 490, n. 14, 287 N.W.2d at 526, n. 14, A-Ap. at 10a.

For seventy-five years this state has conducted open primaries for president and for state and partisan offices. This tradition was born of conviction to stimulate popular participation to end boss rule, corruption, and fraudulent practices of parties. 93 Wis. 2d at 492-93, 287 N.W.2d at 527, A-Ap. at 12a.-13a. In calling for the adoption of a primary, Robert M. La Follette, Sr., argued that if the voter is competent to cast his ballot at the general election, " 'he is equally competent to vote directly at the primary election for the nomination of the candidates of his party.' " *Id.* Because conventions were thought to be susceptible to "manipulation by party leaders ... a widespread faith existed that more popular participation would have a cleansing effect on politics." V. Key, Jr., *Politics, Parties & Pressure Groups* 255 (5th ed. 1942). In 1897 La Follette said at the University of Chicago:

> Beginning the work in the state, put aside the caucus and convention. They have been and will continue to be prostituted to the service of corrupt organization. ... Go back to the first principle of democracy. Go back to the people. Substitute for both the caucus and convention a primary election — held under all the sanctions of law which prevail at the general elections — where the citizen may cast his vote directly to nominate the candidate of the party with which he affiliates, and have it canvassed and returned just as he cast it.

A.F. Lovejoy, *La Follette and the Establishment of the Direct Primary in Wisconsin* 35-36 (1941).

Clearly, the voters discouraged from voting or disenfranchised by the Party rule have individual interests in the outcome of the National Democratic Party's nomination process. Since a voter, "whether he be a registered Democrat or Republican, third party adherent or independent, is given alternative slates by the two major parties, he has a stake in the outcome of the nominating process of both parties." *Bode v. National Democratic Party,* 452 F.2d 1302, 1306 (D.C. Cir. 1971), *cert. den.* 404 U.S. 2019 (1972).

"The right to vote freely for the *candidate* of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims,* 377 U.S. 533, 555 (1964) (emphasis added). "The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance." *Lubin v. Panish,* 415 U.S. 709, 716 (1974).

As the court below noted:

> Once the state provides a primary and makes the vote available to some persons, the right of all persons to vote becomes a basic one under the Constitution. *Rosario v. Rockefeller,* 410 U.S. 752, 764 (1973) (J. Powell dissenting, citing *Dunn v. Blumstein,* 405 U.S. 330 (1972); *Kramer v. Union School District,* 395 U.S. 621 (1969); *Carrington v. Rash,* 380 U.S. 89 (1965)). The United States Supreme Court has protected the voters' right to participate in a primary election from state laws imposing substantial burdens on the franchise. *Rosario v. Rockefeller,* 410 U.S. 752 (1973), *reh. denied.*

411 U.S. 959 (1973); *Kusper v. Pontikes,* 414 U.S. 51 (1973).

93 Wis. 2d at 517-18, 287 N.W.2d at 539, A-Ap. at 35a.

Constitutionally, Wisconsin can stimulate public participation in the critical process of choosing a President. It has had signal success in this effort./[15] The rising number of unaffiliated voters undeniably warrants Wisconsin's encouraging them to affiliate privately with the parties at the primary. Unquestionably, Wisconsin can go farther than the Constitution commands in facilitating the opportunity for political associaton and candidate identification and support.

Recently this Court has recognized, in an area where there is a specific federal constitutional grant of authority, that certain precedent had not limited "the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *Pruneyard Shopping Center v. Robins,* — U.S. —, 100 S.Ct. 2035, 2040 (1980). The explicit authority conferred by article II section I of the Constitution of the United States in conjunction with article III section 1 of the Wisconsin

/[15]Wisconsin had the second highest percentage of voter age turnout in its 1976 primary of the twenty-four states conducting primaries. The increase in voter turnout for the general election was, however, the ninth smallest of the same group. A. Ranney, *Participation in American Presidential Nominations* 25 (Washington, D.C., 1977). One may fairly conclude that the Wisconsin Legislature has been extremely successful at matching its laws with the interests of its citizens to maximize primary voter participation.

Further, Ranney's statistics demonstrate that the states requiring the fewest indicia of party loyalty have the highest turnout rates: Wisconsin (2nd of 28), Oregon (1st), Montana (4th). *Id.* at 11, 25.

Constitution/[16] (for which there is no comparable federal constitutional provision) vests at least as much discretion in the Wisconsin Legislature in determining qualifications of voters in its presidential primary as was recognized in *Pruneyard.*

Lastly, the National Party advances several policy arguments that indicate the true nature of the controversy. They propose that someone's (theirs, an association of political scientists, the "national") interest is served by strong parties and that their own efforts, represented by their exclusionary rule, therefore represent good public policy. Brief of National Party at 27, n. 20. Such reliance on one concept of a National Party's proper role reveals that this dispute is primarily one of policy rather than one of law.

There is, of course, no mention in the Constitution of political parties and, indeed, evidence that the power held by today's major parties would have been foreclosed had it been foreseen./[17] The theoretical and

/[16]Every person of the age of ... [18] years or upwards, belonging to the following classes ... shall be deemed a qualified elector at such elections:

(1) Citizens of the United States.

/[17]"Partisan politics bear the imprimatur only of tradition, not the Constitution." *Elrod v. Burns,* 427 U.S. 347, 369, n. 22 (1976).

> When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest, both the public good and the rights of citizens. To secure the public good, and private rights, against the danger of such a faction, and at the same time to preserve the spirit and form of popular government, is then the great objective to which our inquiries are directed. ... In an equal degree does the increased variety of parties, comprised within the union increase this security.

The Federalist No. 10 (J. Madison) 44 (Oxford, 1948).

political debate on the virtues of strong/weak/two/multiple party systems is ongoing. It is a debate that touches upon the fundamental concepts of democracy as well as the lifeblood of our evolving, increasingly technological society. The debate has no single, static, deductive answer based on law, social policy or majority vote. That is why, at least as they relate to the franchise in presidential primaries, such matters were entrusted to the several states by the framers of our Republic so that various appropriate answers may be found based on the individual state's choice./[18] The importance of the function performed, the impact on non-party-declaring voters' rights, the fundamental representational nature of the question presented all must be balanced only by carefully weighing the facts and cannot be determined/[19] by simplistic statement of the words "first amendment associational rights" as the National Party has asserted.

/[18]In reviewing a state's electoral legislation this Court should not "[fail] to give the States the elbow room they deserve and must possess if they are to formulate solutions for the many and particular problems confronting them." *Kusper v. Pontikes,* 414 U.S. 51, 63 (1973) (Blackmun, J., dissenting).

/[19] [T]he rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made. Decision in this context, as in others, is very much a "matter of degree," Dunn v. Blumstein, *supra,* 405 U.S., at 348, 92 S.Ct., at 1006, very much a matter of "consider[ing] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." Williams v. Rhodes, *supra,* 393 U.S., at 30, 89 S.Ct., at 10; Dunn v. Blumstein, *supra,* 405 U.S., at 335, 92 S.Ct., at 999. What the result of this process will be in any specific case may be very difficult to predict with great assurance.

Storer v. Brown, 415 U.S. at 730.

Wisconsin, as are all states,/[20] is free to choose/[21] to open or close its primary.

III. Wisconsin's Open Primary Law Does Not Abridge The Interests Of The National Party.

The choice made by the citizens of the State of Wisconsin three quarters of a century ago, to recognize in the presidential selection process the associational interests of those who wish to vote without publicly declaring their party preference, is entitled to considerable constitutional deference. *See* sec. I, *supra.* As demonstrated below, the burden of Wisconsin's law on the National Party is not significant and its interests not impaired to the degree necessary to overcome the state's article II section I authority.

/[20]"The question before us is not one of policy but of power ....

[We cannot] recognize the doctrine, that because the Constitution has been found in the march of time sufficiently comprehensive to be applicable to conditions not within the minds of its framers, and not arising in their time, it may therefore, be wrenched from the subjects expressly embraced within it, and amended by judicial decision without action by the designated organs in the mode by which alone amendments can be made.

....

[T]he authority vested in the legislatures by the second clause of section 1 of article II has [not] been divested ...."

McPherson v. Blacker, 146 U.S. 1, 35-36, 40 (1892).

A state may legislate to prevent the perceived evils of crossover voting, *e.g., Rosario v. Rockefeller, supra,* but several states permit crossover voting in their primaries which allow participation by independents and members of

> The National Party has the duty of persuading us that this is a situation in which a state statute significantly infringes the National Party's associational rights. *Marchioro v. Chaney,* 442 U.S. 191, 99 S. Ct. 2243, 2248 (1979). *See also, American Party of Texas v. White,* 415 U.S. 767, 790 (1974). The discussion of substantial burden in this case must focus on whether the open primary law significantly impedes the National Party as it seeks to achieve its stated purposes and objectives.

93 Wis. 2d at 498-99, 287 N.W.2d at 530, A-Ap. at 18a.

Once it has been determined that a substantial restriction or burden has been imposed, the Court then weighs the state's countervailing interests in the proper factual and constitutional context. In the instant case, the National Party, standing alone, cannot demonstrate that any legitimate interest of its own has been more than incidentally burdened. This conclusion was reached by the Wisconsin Supreme Court below after thoroughly and carefully reviewing

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other parties. There is no suggestion that such a clause makes the election laws unconstitutional, nor is it a mandatory prerequisite to constitutionality that independent, non-member electors be permitted to vote in a party's primary. The Connecticut General Assembly has adopted statutes governing political party primaries which it considers best meet the needs of the State. The laws are not invidiously discriminatory but apply to all alike. The legislatures of "[t]he states have broad discretion in formulating election policies." *Tansley v. Grasso,* 315 F. Supp. 513, 519 (D. Conn. 1979) (three-judge court), citing *Williams v. Rhodes,* 393 U.S. 23, 34, 89 S.Ct. 5, 21 L.Ed. 2d 24 (1968).

Nader v. Schaffer, 417 F. Supp. 837, 850 (D. Conn. 1976), *aff'd mem.,* 429 U.S. 989 (1976).

/[21]"A State need not take the course California has ...." *Storer v. Brown,* 415 U.S. 724, 736 (1974).

the applicable facts and law. 93 Wis. 2d at 499-511, 287 N.W.2d at 530-36, A-Ap. at 19a-29a. In order not to simply repeat that persuasive analysis, appellee submits it forcefully speaks for itself and offers only certain points for emphasis here.

The chief interest advanced by the Party and recognized by the commentators has been expressed as preserving the effectiveness or integrity of a vote of its members by preventing its dilution by others inappropriately participating in the process. This is the chief, and, it is submitted, only substantial rationale for the National Party's rule.

Because of the misleading use of terms and data by the National Party, some clarification is necessary. Voters who vote for a candidate who have previously not been affiliated or have been affiliated with another party are generally referred to as "crossovers." Those who crossover in order to give support to the candidate have been referred to as "genuine" or "principled" crossovers. Those who do so in order to impose on an opposing party a weaker candidate are generally referred to as "raiders."/[22]

Appellees submit there is no substantial interest held by the National Party alone that would justify preventing principled supporters of a national candidate of its party/[23] from voting for him or her in an

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/[22]"Raiding" has been defined by this Court as "the practice whereby voters in sympathy with one party vote in another's primary in order to distort that primary's results." *Kusper v. Pontikes,* 414 U.S. 51, 59 (1973).

/[23]The process of ballot access in the Wisconsin presidential primary is not challenged. Therefore the prospect of Genghis Kahn being supported by genuine crossovers *or* raiders is not before the court. Candidates in this case must be presumed to be "of ... [their] political parties ... generally advocated or recognized in the news media throughout the United States" as provided in Wis. Stats. sec. 8.12 (1) (a).

integral part of the presidential selection process./[24] Whatever organizational advantages/[25] a party may gain by forcing these potential voters publicly to declare party preference — and there can be no other advantage to the Party/[26] — they are not of constitutionally cognizable stature.

Take the case of John Q. Public who ordinarily considers himself a Republican, but in a particular presidential election year finds himself supportive of Democratic policies and a candidate. Under Wisconsin law, this voter is free to select, and by his private vote does select, the Democratic Party as his party. The Party raises no objection to his support in the November election, naturally. But the Party forecloses the same voter from supporting the same candidate in the primary. In fact, however, this genuine crossover voter presents no more of a threat to a Party interest in the spring primary than in the general election. And his vote is equally precious to him in both instances. This voter impairs no interest of the National Party in selecting its nominee.

/[24]This is not to say that when a state has determined pursuant to article II section I that the facts and policies of the citizens are so served it cannot close its primary. *Cf. Rosario v. Rockefeller,* 410 U.S. 753 (1973), *reh. den.* 411 U.S. 959 (1973) (upholding party enrollment requirement). Appellees submit that a state may choose to include or exclude (within broad limits), but the choice is its to make in a presidential primary.

/[25]Compiling lists of supporters and nonsupporters for campaign, polling, patronage or other use has been suggested as an advantage to the political organization itself. *Nader v. Schaffer,* 417 F. Supp. 837, 848 (D.C. Conn. 1976), *aff'd mem.,* 424 U.S. 989 (1976).

/[26]Under Rule 2A voters are Democratic voters if they think they are and they say they are. The National Party does not set forth any objective standards against which a voter may test his or her self-designation or against which anyone else may test the voter's designation. Nor does the National Party set forth any subjective standards to guide

Most importantly, this genuine supporter of the Democratic Party and its candidate is the only crossover voter the National Party in fact disenfranchises. First, the raider unquestionably is not a threat in Wisconsin, and he or she would not be deterred by Rule 2A's declaration at the polls. There is no evidence of any appreciable number of unprincipled crossovers. In fact, all evidence shows those who crossover are genuine. *See* materials cited in footnotes 30, 31, and associated text. Further, an independent can hardly be considered a crossover at all. The Party's interest in disenfranchising this voter is reduced solely to its felt need to impose a loyalty oath. But it lies well within the prerogative of a state to promote voting and to secure voting rights to enable these voters to participate meaningfully at this critical stage of selecting a President.

Surely the person supporting the Party's candidate in November is as much an "adherent" as the one supporting the same candidate in the spring primary. One's vote, not a loyalty oath, makes him an adherent in the spring primary as well as in the fall general election. The National Party simply must confess that in truth it has nothing to fear from this voter.

The Party cannot successfully urge that it fears a different voter, namely, the one who will vote for a Democratic candidate in the spring but, his candidate not having won the nomination, will vote for the

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voters in determining their party preference. We could find no explanation by the National Party of who is a Democratic voter for purposes of voting in the primary except that a Democratic voter is a person who makes a declaration of Democratic party preference at the time of voting. We could find no explanation of what the declaration is supposed to signify or of what the voters are committing themselves to in making this declaration.

93 Wis. 2d at 500-01, 287 N.W.2d at 531, A-Ap. at 19a.-20a.

candidate of another party in the fall. In the first place, the Party has failed to show there are any appreciable number of those voters. Second, it has failed to show those who sign the loyalty oath will not do the same thing in the same proportion. Indeed, it recognizes that individuals who they concede are Democratic party members vote Republican when disappointed with the Democratic candidate./[27] Third, the argument employs an intolerable premise that anyone who supports the loser is not principled. There are two reasons why this is folly. First, only nationally recognized Democrats are permitted on the Wisconsin ballot, and they are backed by unquestionably principled Democrats. Wis. Stats. sec. 8.12 (1) (a). Second, a vote does not become principled only if preceded by a loyalty oath. The National Party's fetish with loyalty oaths simply will not deter the unprincipled. Thus, the Party need fear neither those who support the winning Democrat in the spring nor those who support the losing Democrat. Both candidates are nationally recognized Democrats.

Since the National Party's interests are not constitutionally jeopardized by principled supporters, it can prevail only if it can demonstrate a "substantial burden on First Amendment rights,"/[28] *i.e.*, significant raiding.

/[27]In the Party's 1978 report, for example, it was acknowledged that "some Democrats who are displeased with the outcome of the nomination process do not hesitate to vote for the Republican candidate for president." *Openness, Participation and Party Building: Reforms for a Stronger Democratic Party* 25 (1978) (Winograd Commission).

/[28]*Marchioro v. Chaney*, 442 U.S. 191, 199 (1979). *See also, American Party of Texas v. White*, 415 U.S. 767, 790 (1974) ("'absolutely no factual basis in support of their claims that ... [state statutes] imposed unduly burdensome requirements") (quoting lower court findings).

First, the facts extensively displayed in Section II. B. of the National Party's brief all relate to crossovers and not to raiders./[29] No hard or even reliable evidence of any raiding or other than insignificant and inconsequential raiding in Wisconsin is offered by the National Party. Indeed, virtually every serious student of the Wisconsin data has reached the same conclusion: there is none./[30] Recent experience in other states, although of questionable relevance in this proceeding, is in accord./[31] Unsupported fear of a harm for which there is only contrary evidence is no basis/[32] for curtailing the rights of all voters opposed to a public declaration of support for the National Party.

Indeed a careful analysis of the National Party's own materials as well as available research led the court below to the following conclusions:

/[29]Adamany defines crossover voters as "those who do not identify with the party in whose primary they cast ballots, all independents are crossover voters." D. Adamany, *Crossover Voting and the Democratic Party Reform Rules*, 70 Am. Pol. Sci. Rev. 536, 538 (1976).

/[30]"Although there is substantial crossing over, there is precious little evidence of raiding." *Id.*

/[31]*See* materials cited in Note, *The Constitutionality of Non-Member Voting in Political Primary Elections*, 14 Willamette L.J. 259, 282-86 (1978); A. Ranney, *Turnout and Representation in Presidential Primary Elections*, 66 Am. Pol. Sci. Rev. 35-36 (1972); Note, *Primary Elections: The Real Party in Interest*, 27 Rutgers L. Rev. 298, 307, n. 74 (1974); *Developments in the Law — — Elections*, 88 Harv. L. Rev. 1111, 1172-73 (1975); Note, *Constitutional Issues in Durational Party Affiliation Requirements*, 25 Maine L. Rev. 147, 154 (1973). "Some have argued the Republicans 'raid' Democratic primaries. However, the existence of 'raiding' has never been conclusively proven by survey research." *Openness, Participation and Party Building Reforms for a Stronger Democratic Party* 68 (1978) (Winograd Commission).

> [W]e have not been presented with any factual basis to support the National Party's position that under the open primary statute, "Republicans, adherents of other parties, and independents would significantly affect the selection of the Democratic candidates."
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> Nor has the Party shown that the contemporaneous declaration of party preference is a necessary and effective way to prevent Republicans, adherents of other parties, and independents from voting on the Democratic Party ballot. Although some political theorists tend to support requiring a declaration of party affiliation to vote in a primary, it is generally recognized that in the real world in which elections are conducted the closed primary works in substantially the same way as the open primary.

93 Wis. 2d at 509-10, 287 N.W.2d at 535, A-Ap. at 27a-28a (footnote omitted).

Thus, the National Party has failed to establish that there is *any* adverse impact on its interests caused by Wisconsin's Open Primary. Equally unsupported is

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/[32]In *Williams v. Rhodes*, 393 U.S. 23, 33 (1968), this Court dismissed the State of Ohio's unfounded fears of multitudinous fragmentary parties as "no more than 'theoretically imaginable.' No such remote danger can justify the ... crippling impact on the basic constitutional rights involved in this case." (Footnote omitted.)

In *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 342, 125 N.W. 961 (1910), the Wisconsin Supreme Court commented on raiding as follows: "That any considerable following of one political creed will deliberately desert their own party at the primary to foist an unworthy set of candidates on a rival party presupposes a degree of moral turpitude that we cannot presume to exist."

the National Party's position that its Rule 2A is effective in meeting the purported problem even though it disenfranchises the majority of Wisconsin citizens. The Wisconsin Supreme Court concluded that "the Wisconsin open primary law does not impose a substantial burden on the associational rights of the party. Indeed any burden appears speculative, remote and minimal." 93 Wis. 2d at 511, 287 N.W.2d at 536, A-Ap. at 29a.

The legal standard that the Wisconsin Open Primary Law must meet, therefore, is not the "compelling state interest" test. The "rational basis" test was applied in *Rosario v. Rockefeller,* 410 U.S. 752 (1973), *reh. den.* 411 U.S. 959 (1973). There, New York had imposed a timely party registration requirement in order to vote in a primary. Upholding the law, this Court rejected the argument that the enrollment period was too long. The Court said the legislative choice was not "an arbitrary time limit unconnected to any important state goal." 410 U.S. at 760. Further, the Court accepted the appeals court's statement that "'the Constitution does not require that the state choose ineffectual means.'" 410 U.S. at 762, n. 10.

The Court applied the compelling interest test in *Cousins v. Wigoda.* There, however, Illinois' interest in securing the franchise of its voters was held not compelling "in the context of the selection of delegates to the National Party Convention." 419 U.S. at 491. Here, by contrast, the State leaves to the political parties the direction and control of the process to select the individual delegates. Stip., par. 19, Jt. App. at 27.

The Court also applied the compelling interest and strict scrutiny tests in *Kusper v. Pontikes,* 414 U.S. 51 (1973). Illinois, however had prevented a voter from voting for any party other than the one voted for in the most recent primary. In *Storer v. Brown,* 415 U.S.

724 (1974), the Court illuminated the reason for the rational basis test in *Rosario*. The law in *Rosario*, the Court said, was sustained "as '"in no sense invidious or arbitrary,'" because it was '"tied to [the] particularized legitimate purpose."'" 415 U.S. at 731.

Here, Wisconsin's law is tied to a particularized legitimate purpose. That purpose is to encourage voting by guaranteeing ballot privacy in party selection as well as candidate selection. The minimum necessary means to this end is to forbid Party registration and other forms of public loyalty oaths.

There is a further reason why the rational basis test applies. That is because Wisconsin is exercising its own constitutional right to set the qualifications of voters in the selection of candidates in primary elections, and this constitutional right is at least of equal dignity with the associational freedoms of the political parties. The Court has used the rational basis test even in the context of infringements on first amendment freedoms where the state is exercising its own constitutional rights independent of its general police powers. In *California v. LaRue*, 409 U.S. 109 (1972), the Court upheld liquor regulations in the context of sexually explicit entertainment in bars and taverns. The Court admitted that the entertainment did not violate its standards on obscenity. 409 U.S. at 116. It further conceded that the regulations addressed conduct "within the limits of the constitutional protection of freedom of expression." *Id.* at 118. But the critical fact was that the twenty-first amendment granted power to states relative to control of alcohol above and beyond ordinary police powers. *Id.* at 114. The rational basis test was applicable, therefore. *Id.* at 116.

Another illustration that the rational basis test applies where state interests unique to a democracy are involved is *Foley v. Connelie*, 435 U.S. 291 (1978). There, the Court upheld New York's law excluding aliens from positions as police officers notwithstanding precedent that alienage is a suspect class requiring strict scrutiny and a compelling state interest. Peculiarly democratic interests were being asserted by the state. The Court's holding was "no more than recognition of the fact that a democratic society is ruled by its people." 435 U.S. at 296. "[T]he right to govern is reserved to citizens." *Id.* at 297. Accordingly, it was rational for New York to exclude aliens from its police forces.

Here, as in *California v. LaRue,* Wisconsin asserts a specific constitutional right under United States Constitution article II to determine who may vote for President in the primary. Further, as in *Foley v. Connelie,* Wisconsin asserts the fundamental interest of a democracy to maximize voter control over the selection of officials. According, the rational basis test applies.

Wisconsin's law advances the interests of all its citizens to vote/[33] privately/[34] unencumbered by a loyalty oath, facilitates its uniform practice in the spring election of having only non-partisan judicial and local elections,/[35] and represents widespread and

/[33] *Williams v. Rhodes,* 393 U.S. 23, 30 (1968) ("[T]he right of qualified voters, regardless of their political persuasion, to cast their votes effectively"). *Lubin v. Panish,* 415 U.S. 709, 716 (1974) ("[V]oters can assert their preferences only through candidates or parties or both.") *See* sec. II, *supra.*

/[34] Privacy of political preference is "fundamental in a free society," and the advent of the secret ballot is "one of the great political reforms." *Buckley v. Valeo,* 424 U.S. 1, 237 (1976) (Burger, C.J., concurring).

/[35] *Developments in the Law — — Elections,* 88 Harv. L. Rev. 1111, 1212 (1975). *See also* description of Wisconsin's extensive non-

overwhelming popular support for the law subsequent to years of articulate public debate on the issues, and an electorate that votes overwhelmingly on the basis of principled support for the candidate it wishes to lead the country./[36]

The court below/[37] carefully weighed these and related interests/[38] and concluded that "any burden imposed on associational rights by the open primary law is minimal and is justified by Wisconsin's compelling and substantial governmental interests." 93 Wis. 2d at 515, 287 N.W.2d at 538, A-Ap. at 32a. This conclusion, based on the facts and law marshalled by the lower court, recommends itself by its logic and basis in law. Additionally, the rights of voters privately to associate and vote is enhanced, and the National Party's exclusionary rule is constitutionally diminished by Wisconsin's decision on how to exercise its article II section 1 authority.

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partisan spring elections as they relate to the state's system of discrete fall (partisan) and spring (non-partisan) elections. 93 Wis. 2d at 513-14, 287 N.W.2d at 537, A-Ap. at 31a.-32a.

/[36] [M]ost of the crossovers temporarily deserted their party to register their special approval of a candidate, or a policy associated with a candidate, available only in the other party. [Eugene] McCarthy's Republican supporters clearly did not vote for him because they thought he would be the easiest Democrat for Nixon to beat in November; they did so because they liked him and his opposition to the Vietnam war.

A. Ranney, *Turnout and Representation in Presidential Primary Elections,* 66 Am. Pol. Sci. Rev. 35 (1972).

/[37] Where the operation and impact of a state law is determined by the highest court of a state, additional deference to its conclusions is warranted.

/[38] The interests of the State of Wisconsin were identified in the court below as:

> The state's interest in maintaining a primary and in not restricting voting in the presidential preference

IV. Recognizing The Legitimate Role Of The States In Determining Qualifications To Vote For President Need Not Preclude Party "Reform" Or Emasculate A National Party.

The National Party, in defense of its "reforms,"/[39] raises the spectre of a National Party unable to select its members, define its policies, or administer uniform national rules. Only the latter might be affected by the law of this case and probably only in a minor way.

The National Party will still be able to set whatever membership qualifications it desires and define its policies through its internal decision making processes such as convention platform writing. Only party members under Wisconsin law may participate in that matter./[40] Such mechanisms as requiring its nominee to adhere to certain principles (or indeed the entire platform) appear to be reasonable internal rules a party could consider. The political likelihood of closed primary states becoming open is remote. Only if a state could marshall the legislative and executive

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primary to those who publicly declare and record their party preference is to preserve the overall integrity of the electoral process by encouraging increased voter participation in the political process and by providing secrecy of the ballot, thereby ensuring that the primary itself and the political party's participation in the primary are conducted in a fair and orderly manner.

93 Wis. 2d at 512, 287 N.W.2d at 536, A-Ap. at 30a.

/[39]There now appears to be growing questioning of how many of the current "reforms" need to be reconsidered, refined, or abandoned.

/[40]*See* footnote 7 and associated text.

power needed to change its law,/[41] had no history of raiding, had evidence of principled candidate selection by voters able to choose, and had broad legislative and popular support could a state make the instant kind of showing in support of its open primary. Moreover, even fifty states with Wisconsin's law would not impair the Party's interest. A right of voting privacy does not conflict with the Party's right to select delegates.

Therefore, while the National Party may need only address an open primary in one of the fifty states and has alternate, less intrusive means available to meet its objectives, the State of Wisconsin has no alternative to the course it has taken to its goal. The only way effectively to secure privacy is to foreclose public declaration.

To effectuate the will of its citizens it could do no less.

In the real world, it is not credible to assert that a closed primary will not intimidate voting. As stated by Jack Mabley writing in the *Chicago Tribune:*/[42]

> Many Illinoisans don't vote in primary elections because for personal or business reasons they don't want it publicly known whether they vote Democratic or Republican. Our primary system makes a mockery of the so-called "secret ballot."
>
> If you're a Democrat in a heavily Republican area, or vice versa, you'll know what I mean.

/[41]Only Wisconsin now has by law an open primary, the results of which determine presidential candidate strength to be represented by delegates to the national conventions.

/[42]J. Mabley, *Wisconsin Has the Primary Idea, Chicago Tribune,* March 30, 1980, sec. 1, at 4, col. 5.

In Wisconsin they have a true secret ballot. The voter is handed ballots from both parties. In the secrecy of the booth he or she votes one ballot. The other is discarded.

Illinois politicians want to keep the closed primary, of course, so they can keep tighter control of the electorate.

CONCLUSION

The judgment of the Supreme Court of the State of Wisconsin should be affirmed.

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

REPLY BRIEF FOR APPELLANTS

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I. CONTRARY TO APPELLEES' ARGUMENTS, THE ISSUE BEFORE THIS COURT IS NOT WHETHER WISCONSIN HAS THE POWER TO ENACT PRESIDENTIAL PRIMARY STATUTES, BUT WHETHER THE STATE'S EXERCISE OF ITS POWER VIOLATES THE NATIONAL PARTY'S FIRST AND FOURTEENTH AMENDMENT RIGHTS.

Both Appellees argue at length that the State of Wisconsin has authority to regulate presidential preference primaries. The State emphasizes Article

II, section 1 of the United States Constitution (selection of presidential electors) as a source of its authority to enact primary election statutes. *Brief for State* at 9-10. The State Party asserts generally that the National Party's selection of its presidential candidate is so "imbued" with a "public function" that Wisconsin has the power to regulate it. *Brief for State Party* at 9, 30-36.[1]

Neither of these lengthy arguments addresses the issue before this Court. The issue is not whether the State has authority to enact primary statutes. It is whether the State's exercise of its power violates the National Party's First and Fourteenth Amendment rights by forcing the Party to allow non-Democrats to influence its selection of candidates. The National Party has not challenged the State's general authority to regulate the conduct of primary elections; although, it might disagree about the source of that power as an academic matter. The National Party does contend that however a state chooses to exercise its power—whether the power is explicitly granted by the Constitution or drawn from some other source—the State must not exceed the limits imposed by the Bill of Rights and the Fourteenth Amendment to the United States Constitution. *Williams v. Rhodes*, 393 U.S. 23, 28-29 (1968); *see Marchetti v. United States*, 390 U.S. 39, 44 (1968). That should not be a controversial proposition. Resolution of the issue here requires an assess-

[1] Throughout this *Reply Brief* the National Party will refer to the briefs for the State of Wisconsin and the Democratic Party of Wisconsin as "*Brief for State*" and "*Brief for State Party*", respectively.

ment of: (a) whether the State's statute burdens the National Party's exercise of its rights; (b) if so, whether a compelling state interest justifies the burden; and, (c) if so, whether the State has chosen the least restrictive means of fostering its interest.[2]

II. CONTRARY TO THE APPELLEES' ARGUMENTS, THE OPEN PRIMARY LAW AND THE WISCONSIN COURT'S ORDER IMPOSE A SUBSTANTIAL BURDEN ON THE NATIONAL PARTY'S EXERCISE OF ITS FIRST AND FOURTEENTH AMENDMENT RIGHTS.

Aside from a brief allusion to the Wisconsin court's opinion, *Brief for State* at 25-26, neither Appellee attempts to argue (as the lower court did) that the open primary law imposes no burden on the National Party's rights because it is a "Democrats

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[2] Similarly, the arguments of *amici curiae* James MacDonald and Elliot Maraniss that the National Party's nominee selection processes constitute state action are irrelevant in the context of this case. The question before this Court is not whether the National Party's rule constitutes state action that violates the purported rights of non-Democrats who want to influence Democratic candidate selection. The issue is whether the State may force the Party to accept the influences of non-Democrats. The question whether the National Party's rules constitute state action exercised outside the confines of the Constitution is simply not presented here, as it was not in *Cousins v. Wigoda* 419 U.S. 477, 483 n. 4 (1975); *id.* at 494 (Rehnquist, concurring).

Moreover, neither Appellee has raised here or below the question these *amici* attempt to pursue now. No record has been developed on the subject; no consideration of these issues now is appropriate. *See, e.g., Bell v. Wolfish*, 99 S.Ct. 1861, 1870 n. 13 (1979); *Knetsch v. United States*, 364 U.S. 361, 370 (1960).

only" statute. As noted in Appellants' brief, the Wisconsin open primary law permits Republicans, Independents and other nonadherents to vote in the Democratic primary. Non-Democrats have for years crossed over and affected the apportionment among candidates of delegates to the Democratic National Convention. And Wisconsin's attorney general had conceded the intent and operation of the statute from the beginning of the case. See *Brief for Appellants* at 27-29.[3]

There should be no doubt that the statute forces the Party to permit non-Democrats to influence its candidate selection. As noted in Appellants' *Brief Opposing Motion to Dismiss or Affirm*, no one familiar with elections would seriously contend that an open primary limits voting to party adherents. The essence of the Wisconsin statute and open primary laws generally is that any voter may vote in a party's primary regardless of party affiliation.[4]

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[3] The Attorney General apparently has returned to the view of the statute he advanced before the lower court. The brief for the State pointedly criticizes the National Party's rule for excluding "honest Republicans," Independents and minor party adherents from influencing the choice of the Democratic Party's nominee. *Brief for State* at 17.

[4] "The major characteristic of open primaries is that any registered voter can vote in the primary of either party." R. Blank, *Political Parties, An Introduction* 315 (1980). "The states with open primaries [including Wisconsin] allow any qualified voter to participate in a party primary without designating party affiliation or preference." D. Ippolito & T. Walker, *Political Parties, Interest Groups, and Public Policy: Group Influence in American Politics* 175 (1980). "[P]rimaries may be open or closed depending on whether voters can 'cross over' and vote the other party contest (open) or must stick to their own party contest (closed). " S. Brams, *The Presidential Election Game* 2 (1978).

The Appellees contend instead that the statute's abrogation of Rule 2A imposes no significant interference with the National Party's exercise of its rights because the Party's rule does not foster a legitimate purpose. For example, the State argues that the Party has not justified preventing "principled crossovers" from influencing the selection of its candidate. It also argues that the Party has not profferred any evidence that "raiding" has been a problem. *Brief for State* at 26-32.

The purported distinction between "principled crossovers" and "raiders" is irrelevant. The statute substitutes totally the State's judgment for the Party's as to the appropriate standard for participation in the Party's candidate selection processes and the qualification of delegates. Rule 2A has established a standard for participation in the Party's nominee selection processes. The Rule is designed to minimize the dilution of the votes of Party adherents, to limit participation in the candidate selection processes to those who share the Party's values and hopes for electoral success. The statute and the Wisconsin court's order interfere substantially with the Party's exercise of its rights. *Brief for Appellants* at 23-26.[5]

[5] The State Party argues at length that empirical data do not support the Party's perception of the need for Rule 2A. While the National Party believes that neither a state legislature nor a state court may substitute its own judgment for the Party's, the National Party in fact had a solid basis for its concern. As shown in Appellants' brief, more than twelve years of experience and specific data demonstrating the distortion caused by crossovers in Wisconsin offered ample basis for adopting Rule 2A in its present form. *Brief for Appellants* at 4-9, 26-28.

III. THE APPELLEES HAVE NOT DISTINGUISHED *COUSINS v. WIGODA*

The Appellees have not distinguished the instant case from *Cousins v. Wigoda*, 419 U.S. 477, as they cannot. The State reiterates the erroneous assertion that *Cousins*, but not this case, involved selection of individual delegates to the Convention. *Brief for State* at 11-12. See *Brief for State Party* at 18-19. That contention misreads *Cousins* and ignores the facts of this case. The crucial matters at issue in *Cousins* were the same as they are here: the Party's ability to fashion its own candidate selection process and its own qualifications for delegates.[6] *Brief for Appellants* at 22.

Candidate selection was at the heart of *Cousins v. Wigoda*. In *Cousins*, this Court held that Illinois' interests were not compelling because of the "special function" of the delegates to the Convention. That "special function" was and is "the nomination of the party's candidates for the office of President and Vice President of the United States." *Cousins v. Wigoda*, 419 U.S. at 489.

The State also errs in asserting that this case does not involve the functions of writing the platform and voting on party structure and procedures—as as it says *Cousins* did. *Brief for State* at 11. The Party's rules explicitly link apportionment of the delegates among the candidates to the Convention's

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[6] For an extensive summary of the history of national party conventions operating with independence from state laws, see, *Brief for Petitioners* at 48-67, *Cousins v. Wigoda*, 419 U.S. 477 (1975).

other important functions. The Party allocates seats on the Platform, Credentials and Rules Committees on the basis of the candidates' relative delegate strength. Final Call for the 1980 Democratic Convention (Record at 205) at 9. Distortions in the reflection of Democrats' relative candidate preferences thus would seriously affect platform, credentials and rules issues.

Finally, the State Party argues that the Wisconsin court's order here is narrowly drawn and less intrusive than the Illinois court order issued in *Cousins*. *Brief for State Party* at 40. As shown in Appellants' brief, the Wisconsin order intrudes far more severely into the Convention's most important function. Although the Wisconsin court formulated what facially is a negative order,[7] the effect of it is to require the Convention to seat the Wisconsin Party's delegates so long as they comply with all rules other than Rule 2A. As a result, the Wisconsin court's order would force the Convention to seat the delegates from Wisconsin, something the full court in *Cousins* agreed no state could do. 419 U.S. 488; *id.* at 492 (Rehnquist, J., concurring); *id.* at 496 (Powell, J., concurring in part and dissenting in part).

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[7] The Wisconsin court ordered that ". . . Wisconsin delegates to the Democratic Party national convention . . . are not disqualified as delegates solely by reason of the apportionment being determined as required by the Wisconsin statutes." Appendix A to *Jurisdictional Statement* at 42a.

CONCLUSION

WHEREFORE, the National Democratic Party respectfully requests this Court to reverse the order of the Wisconsin Supreme Court on appeal.

Respectfully submitted,

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APPELLEES,

ON APPEAL FROM THE
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MOTION FOR LEAVE TO FILE

AND

BRIEF AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Democratic Conference hereby respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of the attorney for each of the appellants has been obtained. The consent

of the attorneys for each of the appellees was requested but has not been received.

The Democratic Conference, as a group vitally concerned with the future of the Democratic Party, views the decision by the Wisconsin Supreme Court in this case as a serious threat to the future of the party system in the United States. The Democratic Conference and those affiliated with it have been instrumental in effecting many of the reforms instituted by the Democratic Party over the past twelve years, including the requirement that participation in the delegate selection process be restricted to Democratic voters who publicly declare their party preference.

The constitutionally protected right of political association which this Court recognized in Cousins v. Wigoda, 419 U.S. 477 (1975), is especially meaningful and important to the Democratic Conference. The right to associate with others

in the political party of one's choice is one of the most cherised rights enjoyed under our constitutional form of government. This freedom of association is infringed upon by operation of the Wisconsin open primary election law. Under the Wisconsin statute the relative strengths and weaknesses of each component group within the Democratic Party are distorted and exaggerated. This is particularly significant to minority coalitions such as the Democratic Conference. The crossover voters which characterize the open primary system commonly have different candidate preferences than the Democratic party voters in the electorate. See Adamany, Crossover Voting and the Democratic Party's Reform Rules, American Political Science Review, June, 1976.

Every group or organization is equal to the sum of its parts and this is

equally true of political parties. In recognition of the fundamental free association, due process and equal protection rights of each component group and each person within each group, the Democratic Party has adopted a presidential nomination system to insure, as far as possible, that each voter and each group has a real opportunity to reflect their true candidate preference in the delegate selection and nominating processes. This Court, in Cousins v. Wigoda, recognized the vital role of coalitions, often cutting across state lines, in the process of choosing Presidential and Vice-Presidential candidates. 419 U.S. 477, 490 (1975).

As a group which has been in the forefront of the reform movement within the Democratic Party and as a group with an active, if not majority, role in shaping Democratic Party issues, the Democratic

Conference considers its future and the future of similar groups and organizations dubious if the decision of the Wisconsin Supreme Court is allowed to stand. The National Democratic Party requirement that only publicly declared and recorded Democrats may participate in the delegate selection process is not a concern of the National Democratic Party alone but is equally a concern of minority reform groups such as the Democratic Conference. The Second Circuit Court of Appeals acknowledged this fact in Rosario v. Rockefeller:

> [T]he efficacy of the party system in the democratic process-its usefulness in providing a unity of divergent factions in an alliance for power - would be seriously impaired were members of one party entitled to interfere and participate in the opposite party's affairs. 458 F.2d 649, 652 (2d Cir. 1972), aff'd, 410 U.S. 752 (1973).

We respectfully request that we be granted leave to file a brief amicus curiae in this case in support of appellants, Democratic Party of the United States of America and Democratic National Committee.

Respectfully submitted,

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ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

BRIEF AMICUS CURIAE FOR THE DEMOCRATIC CONFERENCE

This brief is presented in support of appellants.

We rely on appellants' treatment of this Court's jurisdiction, of the opinion below, of the questions presented, of the constitutional provisions involved and of the Statement of the Case.

INTEREST OF AMICUS CURIAE

Since its formation in 1975 the Democratic Conference has played an important role in Democratic Party organizational issues. Its organizing committee includes members of Congress, state party officers and officials from international unions, as well as representatives from womens' and minority organizations. The Democratic Conference is an informal coalition of active Democrats and organizations who seek to strengthen the party system in the United States. Its supporters, who cut across candidate lines, are interested in

issues which relate to future Democratic Party structure independent of any candidate considerations.

Amicus Curiae views the decision below by the Wisconsin Supreme Court as a grave and serious threat to the party system in the United States and to the progress which has been achieved in recent years in making the Democratic Party and its political processes more open, democratic and meaningful.

ARGUMENT

This case presents the fundamental and critical question of the relationship between state laws dealing with the selection of delegates to national party nominating conventions, on the one part, and the rules, regulations, procedures and decisions of the national party relating to the selection of delegates to

nominating conventions and these nominating convention themselves. Amicus Curiae maintains that the holding below by the Wisconsin Supreme Court "that the Wisconsin open primary law violates neither the State nor the federal constitution", 287 N.W. 2d 519, 522 (1980), disregards the recognition by this Court of the constitutional rights of political association of the Democratic National Party and its adherents and threatens to nullify the numerous advances achieved in recent years in making the process of selecting candidates for the two highest elective offices in the Nation more democratic and meaningful.

I

THE DEMOCRATIC NATIONAL PARTY AND ITS ADHERENTS ENJOY CONSTITUTIONALLY PROTECTED RIGHTS IN THE AREAS OF DELEGATE SELECTION AND NOMINATION OF CANDIDATES FOR PRESIDENT AND VICE PRESIDENT WHICH OUTWEIGH ANY COUNTERVAILING STATE INTEREST

This Court in its decision in Cousins v. Wigoda, 419 U.S. 477 (1975), stated categorically that "The National Democratic Party and its adherents enjoy a constitutionally protected right of political association." 419 U.S. at 487, see also Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973). This freedom of political association for the purpose of advancing common political beliefs and

ideas is at the heart of our democratic process and is protected from federal encroachment by the First Amendment to the Constitution. In prior decisions this Court has recognized and extended this concept to protect against infringement by state action. 419 U.S. at 487, see also Williams v. Rhodes, 393 U.S. 23, 30-31 (1968). Time and again this Court and others have reiterated the proposition that associational rights lie at the "core of our electoral process and of First Amendment freedoms." Williams v. Rhodes, 393 U.S. at 32. They are therefore accorded the fundamental protection afforded by the First and Fourteenth Amendments to the Constitution.

It can not be denied that appellants in this case enjoy fundamental constitutional rights of free political association. Against this interest must be weighed the state interest in maintaining its own electoral process. As this Court has stated on numerous occasions, in weighing these competing interests, it is not sufficient that the state interest be legitimate but rather it must be "compelling" in order to justify infringement upon constitutionally protected rights of appellants. NAACP v. Alabama, 357 U.S. 449, 463 (1958).

The Wisconsin Supreme Court in its decision set forth the competing interests it had to balance:

> [T]hat of the National Party and its adherents to associate for the advancement of political beliefs, including the nomination of candidates for political office; that of Wisconsin citizens to cast their votes in the primary election, a significant step in the process of electing the President of the United States; that of Wisconsin citizens not to have their association with a political party a matter of public record; that of the state to protect and preserve the integrity of the nominating process and to conduct the primary, and political party participation therein, in a fair and orderly manner. 287 N.W. 2d at 522.

After weighing these interests the Wisconsin Supreme Court determined "that Wisconsin has a compelling state interest in not requiring that voters publicly declare their party preference and have that preference publicly recorded". Id.

In arriving at this conclusion the Wisconsin Supreme Court makes a fundamental error regarding which party bears the burden of persuasion when an infringement upon constitutional rights is alleged. The Wisconsin Supreme Court claims that "[t]he National Party has the duty of persuading us that this is a situation in which a state statute significantly infringes the National Party's associational rights". Id. at 530. Having demonstrated, as appellants have here, that they enjoy constitutionally protected rights which have been infringed upon by the state statute, the burden shifts to the state to demonstrate that it has a compelling interest in doing so. This Court recognized this principle in Elrod v. Burns, 427 U.S. 347 (1976):

> It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny....Thus encroachment "cannot be justified upon a mere showing of a legitimate state interest." Kusper v. Pontikes...The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest. 427 U.S. at 362.

Regardless of how legitimate the Wisconsin state interest may be, and in this case the legitimacy of requiring the Democratic Party to permit Republicans, independents and others to influence its nominating process is dubious, it certainly fails to meet the standard of "compelling". This is a burden which the state must meet and, failing to do so, it can not and should not be allowed to impair and infringe upon the First Amendment rights of the Democratic National Party and its adherents.

In its decision the Wisconsin Supreme Court attempts to minimize the impact of its "open" primary law on the grounds that "the sole function of the Wisconsin presidential preference primary is to apportion the number of delegates among the presidential candidates on the ballot for that party". 287 N.W. 2d at 524. As the Wisconsin court points out "[t]he process of selecting the convention delegates in Wisconsin is under the control and direction of the State Party". Id. Since the actual selection of delegates is within the control of the Wisconsin Democratic Party and participation in their selection is limited to persons who publicly proclaim their allegiance to the Democratic Party, the Wisconsin Supreme Court deduced that the effects of the open primary on the nominating process were

minimal. This argument overlooks one crucial fact, i.e. that delegates to the national convention are bound to cast their votes at the convention in accordance with the outcome of the presidential preference vote in which all voters participated. This interaction between the delegate selection process and the presidential preference vote can not be ignored in assessing the infringement that the Wisconsin statute causes upon the associational rights of the Democratic National Party and its adherents.

The delegate selection and nominating processes of the Democratic Party are of paramount importance, not only to the Democratic Party but to the whole Nation. As this Court pointed out in its decision in Cousins v. Wigoda, the "States themselves have no constitutionally mandated role in the great task of the selection of Presi-

dential and Vice-Presidential candidates". 419 U.S. at 489-90. In this area, however legitimate the interest of the state, this state interest must yield to the overriding national interest of preserving the effectiveness of the selection of candidates for President and Vice President. If it were otherwise, a party's delegate selection and nominating processes could be subjected to the endless conflicting demands of each of the fifty states, which would render meaningless the associational rights of the Democratic National Party and its adherents. Amicus Curiae firmly adheres to the position this Court enunciated in Cousins v. Wigoda that the "Convention serves the pervasive

national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual State." 419 U.S. at 490.

Applying the rationale and standard of the Cousins v. Wigoda decision to this case makes the paramount right of the Democratic National Party to govern its own delegate selection and nominating processes indisputable. The state of Wisconsin has failed to demonstrate that its interest is compelling. In the absence of such a showing, this Court can not and should not let stand the decision of the Wisconsin Supreme Court which infringes upon the constitutionally protected associational rights of the Democratic National Party and its adherents.

II

THE DEMOCRATIC NATIONAL PARTY, THROUGH ITS RULES, REGULATIONS, PROCEDURES AND DECISIONS, HAS DECLARED UNEQUIVOCALLY ITS COMMITMENT TO MAKING THE PROCESS OF NOMINATING OUR CHIEF EXECUTIVE MORE DEMOCRATIC AND MEANINGFUL

In the aftermath of the 1968 Democratic National Convention the Democratic National Party studied, reviewed and recommended reforms in its rules for selecting nominees for President of the United States. This process commenced with the establishment of a Commission on Party Structure and Delegate Selection (the McGovern/Fraser Commission), which made profound and far-reaching recommendations for reform. Mandate for Reform, A Report of the Commission on Party Structure and Delegate Selection (April, 1970).

Among these recommendations the McGovern/ Fraser Commission required State Parties to adopt rules that would facilitate maximum participation among interested Democrats in the processes by which National Convention delegates are selected. In addition this Commission, in its guidelines for delegate selection, gave explicit recognition to the fact that "a full opportunity for all Democrats to participate is diluted if members of other political parties are allowed to participate in the selection of delegates to the Democratic National Convention." Official Guidelines For Delegate Selection, A Report of the Commission on Party Structure and Delegate Selection (November, 1969).

The recommendations of the Mc Govern/Fraser Commission were subsequently incorporated into the Call to the 1972 Convention.[1] They were also favorably received by those monitoring their implementation at the 1972 Democratic National Convention. Americans For Democratic Action, "Let Us Continue...", A Report on the Democratic Party's Delegate Selection Guidelines (1973). The 1972 Convention renewed the mandate for reform of the delegate selection and nominating processes by calling upon the Democratic National Committee to appoint a new commission to review and recommend reforms in the procedures for delegate selection utilized for the 1972 Convention. The

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1. The Call sets forth the formal requirements of the delegate selection and nominating processes for each national convention.

Commission on Delegate Selection and Party Structure (the Mikulski Commission), as the successor to the McGovern/Fraser Commission, addressed itself to enhancing the role of every Democrat in the delegate selection and nominating processes. Democrats All: A Report of the Commission on Delegate Selection and Party Structure (December, 1973). The Mikulski Commission made a number of recommendations, some basically reiterating the recommendations of the McGovern/Fraser Commission and others of a more significant nature. Among these the Mikulski Commission unequivocally mandated that "State Parties must take all feasible steps to restrict participation in the delegate selection process to Democratic voters only." Id. This recommendation was in marked contrast to the more general discussions of this topic contained in the

McGovern/Fraser Commission Report and was incorporated into the Delegate Selection Rules for the 1973 Convention.

As further evidence of the level of commitment the National Democratic Party had to these reforms, the Party, in adopting its Charter and By-Laws in 1974, specifically included among its qualifications for delegates that they be chosen through processes which "restrict participation to Democrats only". Article Two, section 4, Charter of the Democratic Party of the United States.

In 1975 the National Democratic Party established another commission to review and evaluate the delegate selection and nominating processes known as the Commission on Presidential Nomination and Party Structure (the Winograd Commission). In its report the Winograd Commission out-

lined the historical developments in the Democratic Party nominating process, made certain recommendations not involving rules changes and also set forth elaborate and specific proposed delegate selection rules for the 1980 Convention. Openness, Participation and Party Building: Reforms for a Stronger Democratic Party (February, 1978). The Winograd Commission specifically recognized the problems posed by open and crossover primaries and proposed delegate selection rules for the purpose of solving these problems. Among other findings the Winograd Commission recommended that "participation in the delegate selection process in primaries or caucuses shall be restricted to Democratic voters only who declare their party preference and have that preference publicly recorded." Id. at 69.

In its Delegate Selection Rules

for the 1980 Democratic National Convention the Democratic National Committee sought to implement the recommendations of the Winograd Commission in order to maximize the participation of Democrats in the process of selecting delegates and nominating candidates. Rule 2A is a direct outgrowth of that motivation and includes, verbatim, the language of the Winograd Commission. To further buttress its commitment to restrict the delegate selection and nominating processes to Democratic voters the Delegate Selection Rules for the 1980 Democratic National Convention, in Rule 2B, specifically state that no Rule 20 exemption, on the basis of a conflict between a given rule and state law, shall be granted from compliance with the requirements of Rule 2A.

Since 1968 the Democratic Party has implemented a series of reforms for the purpose of making Democratic voter participation in the selection of delegates and nomination of candidates for our Nation's two highest elective offices more democratic and meaningful. These have ranged from abolition of the unit rule, which permitted winner-take-all primary results, to the requirement that delegations fairly reflect the division of preference of those participating in the presidential nominating process. In addition the Party has continued to support the concept of an "open party" which guarantees a full opportunity for minority group participation. Amicus Curiae views these reforms as extremely meaningful and vital to the future of the Democratic National

Party. In addition, these reforms have been instrumental in enabling the adherents of the Democratic Party to exercise the constitutionally guaranteed associational rights which this Court has recognized in a more meaningful manner.

CONCLUSION

The Supreme Court of Wisconsin has held "that the Wisconsin open primary law violates neither the state nor the federal constitution." If this ruling is allowed to stand it will reverse the democratic progress achieved in the area of National Democratic Party affairs over the past twelve years. It would also render meaningless the "constitutionally protected right of political association" enjoyed by The National Democratic Party and its adherents this Court recognized in its Cousins v. Wigoda decision. The process

of selecting delegates and nominating candidates for the highest elective offices in our Nation is undeniably within the parameters of this protected right. If it were otherwise the vitality of this right would always be dependent upon the vagaries of state officials and others who can be and often are subjected to political pressures and considerations of an undemocratic nature. We respectfully submit that the decision below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DEMOCRATIC PARTY OF THE
UNITED STATES OF AMERICA and
DEMOCRATIC NATIONAL COMMITTEE,

Appellants,

v.

WISCONSIN ex rel. BRONSON C. LA FOLLETTE,
and DEMOCRATIC PARTY OF WISCONSIN,

Appellees.

**ON APPEAL FROM THE
SUPREME COURT OF WISCONSIN**

BRIEF OF AMICI CURIAE JAMES MacDONALD and ELLIOTT MARANISS URGING AFFIRMANCE

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IN THE

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BRIEF OF AMICI CURIAE JAMES MacDONALD and ELLIOTT MARANISS URGING AFFIRMANCE

INTERESTS OF *AMICI*

James MacDonald and Elliott Maraniss are two long-time residents of the State of Wisconsin whose interests will be directly affected by the disposition of the present proceeding. Mr. MacDonald is a Professor of Law at the University of Wisconsin and Mr. Maraniss is the Editor of

the *Madison Capital Times,* a daily newspaper serving Wisconsin's capital city. Both are "independent" voters, who, for nearly the past two decades, have chosen not to affiliate with a political party. For both *amici,* this choice has been one of conscience – neither wholeheartedly subscribes to the goals of any party. Moreover, as a journalist, Mr. Maraniss' interest in remaining impartial is particularly strong. Accordingly, both *amici* have a significant interest in preserving Wisconsin's open primary system which permits them to exercise their franchise in the presidential primary of the party of their choice. Under Wisconsin law, both independents, such as Mr. MacDonald and Mr. Maraniss, and members of the Republican party, may vote in the Democratic presidential primary without publicly declaring allegiance to the Democratic Party.

The interests presented by *amici* in this case are the interests of independent voters who wish to participate in presidential primaries, but who decline to affiliate with an organized political party. It is their position that independent voters have a right, protected by the Constitution, to participate in state-run, federally-financed, and state-mandated presidential primaries. Accordingly, *amici* urge the Court to hold that a State may, in its discretion, enact and enforce open primary laws which accord independent voters the right to vote in the party primary of their choice without having to declare an allegiance to that party. *Amici* express no view as to the propriety of excluding members of the Republican Party from the Democratic Party primary, and their argument would not require the State to continue to allow Republicans, as opposed to independents, from participating in the Democratic presidential primary. Because the interests of *amici* are not co-extensive with those of the State or of the Wisconsin State Democratic Party, a presentation of *amici's* views in

this brief will provide this Court with a different vantage point from which to assess the important constitutional issues raised in this appeal.

SUMMARY OF ARGUMENT

This case presents the question of whether the State of Wisconsin may, consistent with the First Amendment, operate a presidential preference primary system which allows voters who decline to declare publicly that they are affiliated with a given political party to participate in that party's presidential primary. Appellants, Democratic Party of the United States and the Democratic National Committee ("Party"), contend that Wisconsin's failure to require a public declaration of affiliation as a prerequisite to voting raises the spectre that non-Democrats will participate in the selection of the Democratic presidential nominee, thereby infringing appellants' associational rights to select a candidate free from influence by independent and cross-over voters.

Amici submit that this Court should reject appellants' rigid analysis and rule that "closed" primaries, which exclude independent voters, are neither mandated by the Constitution, nor even permitted by it when presidential primaries are run and financed as they are today in Wisconsin.[1] Two points are central to *amici's* argument that the Wisconsin presidential primary system, as it applies to independent voters, is constitutionally compelled:

1. Appellants' argument that Wisconsin's open presidential primary system abridges its associational rights rests on a serious mischaracterization of the nature of the primary process. The linchpin of appellants' argu-

[1] *Amici* express no view as to whether the Constitution requires the exclusion of voters who are members of adverse political parties.

ment – that major political parties are nothing more than private clubs whose members retain a monopoly on all stages of the selection process preceding the general election – is outmoded and has been discredited by this Court. Public financing of presidential primaries and political conventions, coupled with pervasive state and federal regulatory control of the primary process, put to rest any contention that major party primaries are private, internal affairs. *See, e.g., Buckley v. Valeo,* 424 U.S. 1 (1976).

2. Appellants' contention that closed primaries are required by the Constitution places the asserted associational rights of the Democratic Party on a collision course with the rights of independent voters. Endorsement of the Party's position by this Court will inevitably mean that independent voters will be forced into choosing between the exercise of their fundamental rights to vote and to associate in support of a particular candidate on the one hand, and the exercise of their fundamental rights to be free of coerced affiliation and to maintain their privacy of association on the other. Imposition of this choice violates the settled principle that the State may not require its citizens to forego exercise of one fundamental right in order to enjoy another, absent the most compelling justification. *Elrod v. Burns,* 427 U.S. 347 (1976); *Dunn v. Blumstein,* 405 U.S. 330, 342 (1972).

The interests asserted by the Party do not approach this rigorous standard. Appellants contend that a public declaration is needed to assure that only "Democrats" participate in the selection of the Party's candidate. But appellants' portrait of "Democrats" as having a commonly-held set of ideological goals bears little resemblance to the pluralistic, coalition-based parties which in fact predominate. As this Court recently observed: "In many situations, the label 'Republican' or 'Democrat' tells the

voter little." *Buckley v. Valeo, supra,* 424 U.S. at 70. *See also Rosario v. Rockefeller,* 410 U.S. 752, 769-70 (1973) (Powell, J., dissenting). Moreover, appellants disregard the fact that for large numbers of voters, statements of affiliation are nothing more than tickets to the ballot box, importing no acceptance of Party "ideology." Indeed, no meaningful test of Party loyalty is required by the Party and certainly none is at issue here. Thus, the justifications proffered by appellants are not compelling.

Two other factors lend support to *amici's* position. First, independent voters now play an increasingly important role in electoral politics. For various reasons, their ranks have steadily grown over the past decade until at least 38% of the electorate across the country now term themselves independents. It is this broad segment of American voters that appellants' seek to disenfranchise at this critical stage of our political process. Second, the right appellants seek to deny *amici* is perhaps the most basic right enjoyed by citizens in a democracy. As a matter of simple fairness, independents should not be excluded from participation at an integral stage of the process and thus be forced to accept the choices made by their neighbors on so important a matter, absent the most compelling justifications. At a time when increasing numbers of the electorate are dissatisfied with existing institutions, particularly the major political parties, those who seek to participate should not be denied that right, simply to advance the parochial interests of those in leadership positions of the major political parties.

ARGUMENT

I. THE PRIMARY PROCESS IS A PUBLIC FUNCTION AND THUS VOTERS CANNOT BE EXCLUDED ABSENT A COMPELLING GOVERNMENTAL INTEREST.

At the core of appellants' argument is the contention that determining eligibility to participate in the Party's presidental candidate selection process is solely an internal, private Party matter into which the State may not permissibly intrude. This argument is no doubt advanced to sharply narrow the scope of this Court's inquiry. For if this Court concludes that determining voter eligibility for primary elections is in fact a purely private activity of the Party, the issue then framed by this action would be limited to whether the provisions of Wisconsin law directing the Party to allow non-Democrats to participate in the primary is justified by a compelling state interest which overrides the Party's right of association. This characterization of the primary process as a private party concern, however, is seriously in error because it overlooks the fact that the primary is state-run, federally-financed, and state-mandated – thus plainly removing it from the class of private associational activities entitled to heightened First Amendment protection.

Following this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), upholding in large measure the constitutionality of the 1974 amendments to the Federal Election Campaign Act ("FECA"), there can be no plausible claim that presidential primaries remain the private province of the major political parties. While appellants do not cite, much less discuss, the 1976 amendments to FECA, or this Court's decision in *Buckley*, it is necessary to examine the basic changes in the electoral process brought about by FECA to comprehend fully the issues posed in this case.

The 1974 amendments to FECA have been called "by far the most comprehensive reform legislation ever passed by Congress concerning the election of the President, Vice-President and members of the Congress." *Buckley v. Valeo, supra,* 424 U.S. at 7, *quoting* 519 F.2d 821, 831 (D.C. Cir. 1975). Broadly conceived, the amendments, among other things, entirely restructure the financing of the election of federal officials, providing federal funding for all phases of the presidential election process. Two features of the amendments are especially relevant. First, they set up a fund to furnish matching grants to candidates running in presidential primaries. 26 U.S.C. § 9031, *et seq.* Qualifying candidates can draw on federal funds to supply nearly half of their primary expenses. However, because the number of candidates is the largest at this stage of the campaign, the law imposes stringent threshold requirements to restrict public expenditures to only serious candidates – typically those affiliated with a major party.[2] While the overall impact of this radical change in the way primary campaigns are funded has yet to be fully assessed, it is beyond dispute that the federal government is now underwriting the campaign efforts of most of the chief contenders for major party nomination. For example, in the 1976 presidential primary campaign, Democratic candidates received over fifteen million dollars in federal funds; Republican candidates were furnished almost ten million dollars.[3] In the 1980 presidential primary, over 25 million dollars in federal matching grants were disbursed to nine major party candidates.[4] Not a

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[2]Federal Election Commission, *Disclosure Series No. 7: 1976 Presidential Campaign,* 4 (May 1977).

[3]*Id.* at 9.

[4]Federal Election Commission Reports on Financial Activity 1979-1980, *Interim Report No. 7: Presidential Pre-Nomination Campaigns,* 1 (July 1980).

single candidate from a minor or new political party qualified for federal matching funds.[5]

The second important feature of the amendments is that they provide for federal funding of the general election campaign, including over $2,000,000 to each of the major parties to defray the expenses of their nominating conventions. 26 U.S.C. § 9008. Thus, the federal government is providing the funding for the entire range of activities leading up to the choice of the Party's nominees, as well as supporting the Party's general election campaign. The Democratic Party and its primary candidates have, of course, been among the chief beneficiaries of these funding provisions. Although the Party and its candidates remain free to reject federal assistance and thereby preserve the private nature of their selection process, they have not done so. To the contrary, as noted above, massive amounts of federal funds have been committed to, and expended by, the Party and its candidates on the Party's selection process. Since it is the taxpayer, not the Party, footing the bill for a substantial portion of the expenses incurred by the Party's primary candidates, as well as all of the Party's expenses in holding its nominating convention, appellants' argument that the primary process is a purely internal affair cannot be sustained.

Appellants' argument would have had little force even prior to the 1974 amendments to FECA, however. Wisconsin State law regulates pervasively all phases of the primary process. In addition to determining voter eligibility, the State designates the day for the primary, regulates the manner in which the voters cast their ballots, polices the voting areas, and shoulders the expenses that attend the election process. The State cannot, of course, compel the Party to select its presidential nominee through the

[5] *Id.*

primary system. However, once the Party determines to do so, it is then subject to the conditions set forth in the primary laws, and cannot pick and choose as to which provisions it will abide by. Accordingly, in light of the extensive roles of both the federal and state governments, appellants' claim that the primary process is a private Party matter must be rejected.

The fact that major party primaries play a crucial part in the electoral system further undermines appellants' position. The nomination of candidates by the major parties has been called the "most critical stage" of the electoral process. Matthews, *Presidential Nomination: Process and Outcomes,* in CHOOSING THE PRESIDENT 35, 36 (J. Barber ed. 1974) *quoted in* Developments, *Election Laws,* 88 Harv. L. Rev. 1111, 1151 (1975); *see also United States v. Classic,* 313 U.S. 299 (1941). Indeed, this Court long ago observed that "[a]s a practical matter, the ultimate choice of the mass of voters is predetermined when the [major party] nominations have been made." *Newberry v. United States,* 256 U.S. 232, 286 (1921) (Pitney, J., concurring); *see also Storer v. Brown,* 415 U.S. 724, 735 (1974); *Kusper v. Pontikes,* 414 U.S. 51 (1974).

Recognizing the critical importance of the primary, this Court has historically been vigilant in protecting the rights of voters to participate in primary elections. Since the *White Primary Cases,*[6] it has been established constitutional doctrine that any limitation on participation that "touch[es] upon the machinery whereby candidates are nominated" is subject to constitutional scrutiny. *Georgia*

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[6] *Terry v. Adams,* 345 U.S. 461 (1953); *Smith v. Allwright,* 321 U.S. 649 (1944); *Grovey v. Townsend,* 295 U.S. 45 (1935); *Nixon v. Condon,* 286 U.S. 73 (1932); *Nixon v. Herndon,* 273 U.S. 536 (1927).

v. National Democratic Party, 447 F.2d 1271, 1275 (D.C. Cir.), *cert. denied,* 404 U.S. 858 (1971); *see also* Developments, *Election Laws,* 88 Harv. L. Rev. 1111, 1156-57 & n.33 (1975).

Appellants place principal reliance on this Court's decision in *Cousins v. Wigoda,* 419 U.S. 477 (1975), asserting that it precludes any state law from affecting the delegate selection process in any way. Appellants' Brief at 20. There are several reasons why appellants' position regarding the effect of *Cousins* on this controversy should be rejected.

Cousins arose because the delegate selection rules of the Democratic National Party designed to provide adequate representation to all groups were in direct conflict with the results of a primary conducted under an Illinois statute. This Court held that it was the Party, not the State, that must decide how specific delegate selection contests should be resolved, and that the interests which the State sought to foster were not sufficiently compelling to override the fundamental associational rights of Party members. *Cousins* does not mean, however, that a state law prohibiting discrimination against women would have no effect if the Party had a "men only" delegate rule. *Cousins* simply holds that when the individual state interest in imposing its delegate selection criteria on a national basis is small, and the amount of intrusion in the details of delegate selection and the possibility of subjecting the Party to a multiplicity of contrary rules is great, the associational interest of the Party predominates. Because the mixture of factors in this case differs greatly from *Cousins,* the Court must examine them independently and not mechanically invoke *Cousins* as the Party urges.

There is another more fundamental reason why *Cousins* does not bear on the position taken by *amici.* As we have

demonstrated above, the Party is acting as a governmental agent in connection with the presidential nominating process. Thus, *amici's* principal argument is that because the Party is not a purely private association, the Constitution precludes it from excluding independent voters from the process, unless it can establish a compelling reason for doing so. In *Cousins,* however, this Court did not decide the state action issue but instead ruled on the basis of the effect of a state statute on a private organization. *See* 419 U.S. at 483 n. 4. Therefore, because this Court began its analysis in *Cousins* based on entirely different underlying factual premise than exists here, *Cousins* is not dispositive.

Accordingly, *amici* submit that appellants' contention that a state-run, federally-financed, and state-mandated primary election, the results of which directly affect all voters, is a private Party matter not subject to constitutional constraint, simply cannot stand. To the contrary, in order for this Court to sustain appellants' contention that the exclusion of independent voters is constitutionally required, the Court must first determine that the exclusion directly furthers an overriding governmental interest — one which is so weighty that it justifies submerging the fundamental interests of independent voters to those of the Party. And, as we now demonstrate, no such showing has been, or could be, made by the Party.

II. APPELLANTS' ARGUMENT IGNORES THE CONSTITUTIONALLY PROTECTED RIGHTS OF INDEPENDENT VOTERS.

The defects inherent in appellants' argument become even more apparent when arrayed against the constitutionally protected rights of independent voters that closed

primaries infringe upon. While *amici* recognize that the constitutionality of one closed primary system has been upheld, *see Nader v. Schaffer,* 417 F. Supp. 837 (D. Conn.), *aff'd mem.,* 429 U.S. 989 (1976), that decision is not controlling here. In the first place, that case held only that closed primary laws were constitutional – not that they are constitutionally required. Indeed, the decision strongly suggests that open primary laws would pass constitutional muster, noting that the "states have broad discretion in formulating election policies." *Id.* 417 F. Supp. at 850 (citations omitted).

More importantly, *Nader* arose in the context of a broad-scale attack on Connecticut's primary system, including primaries concerning the election of state officials. In marked contrast, the question here is narrowly focused upon participation in presidential preference primaries. As noted above, the fact that these primaries are run by the state, financed by the federal government, mandated by state law, and concern the selection of our Nation's highest office-holders, substantially alters the nature of the constitutional inquiry. Thus, *amici* submit that the question in this case devolves into whether the State, in its discretion, may opt for an open presidential primary law. In light of the fact that closed primaries directly abridge several fundamental rights of independent voters, *amici* submit that when the justifications proferred by appellants for mandating closed primaries are balanced against the rights of independent voters to exercise fully certain fundamental rights protected by the Constitution, it becomes clear that the States should at least have the latitude of determining that the rights of independent voters need not be subordinated to those of the Party.

Prior decisions of this Court firmly establish that the total exclusion of independent voters from the primary

process infringes their right to vote. In a series of cases, this Court has held that under the equal protection clause of the Fourteenth Amendment, every citizen enjoys a fundamental right to vote, equal to that of other citizens. *E.g., Reynolds v. Sims,* 377 U.S. 533 (1964). A number of decisions have expressly recognized that the reach of the equal protection clause extends to the right to vote in primary elections. *Rosario v. Rockefeller,* 410 U.S. 752 (1973); *Bullock v. Carter,* 405 U.S. 134 (1972); *Gray v. Sanders,* 372 U.S. 368 (1963). One of the basic principles articulated by this Court in protecting the right to vote is that once the State has provided for popular elections, it may not disenfranchise any voters "who are as substantially affected and directly interested in the matter voted upon as are those who are permitted to vote." *Cipriano v. Houma,* 395 U.S. 701, 706 (1969); *accord, Hill v. Stone,* 421 U.S. 289, 295-98 (1975); *City of Phoenix v. Kolodziejski,* 399 U.S. 204, 207-13 (1970); *Kramer v. Union Free School District,* 395 U.S. 621, 632-33 (1969). All voters are affected in much the same way by the results of major parties' primary elections since the choice presented to everyone in the general election is significantly narrowed. *See Newberry v. United States,* 256 U.S. 232, 286 (1921) (Pitney, J., concurring).

Prior decisions of this Court make it equally clear that *amici* also enjoy a right to associate in support of a particular candidate, regardless of their or the candidate's party affiliation, and that full enjoyment of this right would be denied to them if appellants' position was accepted by this Court. In *Buckley v. Valeo, supra,* this Court upheld the FECA's limitations on contributions to candidates, despite the fact that the limitation burdened "one important means of associating with a candidate." *Id.* at 22. By contrast to the ability to contribute money

freely, which this Court viewed as a "narrow aspect of political association," *id.* at 28, the ability to *vote* for a candidate is at the core of associational rights. *Kusper v. Pontikes,* 414 U.S. 51 (1973). By seeking to deny *amici* the right to vote for particular candidates in primary elections, appellants are, in effect, advocating that *amici's* rights to associate freely in support of those candidates be sharply curtailed.

Appellants' argument, if adopted, would also deprive independent voters of their right not to be coerced into unwanted association. This right was recognized in *Elrod v. Burns,* 427 U.S. 347 (1976), where this Court held that state officials may not condition retention of public employment on affiliation with a political party. In so holding, Mr. Justice Brennan's plurality opinion emphasized that coercion of allegiance itself violates an individual employee's associational rights. "Even a pledge of allegiance to another party, however ostensible, only serves to compromise the individual's true beliefs." *Id.* 355. This Court recently reaffirmed the vitality of *Elrod v. Burns* in upholding the right of professional employees, namely attorneys serving as public defenders, to be free from coerced political affiliation in order to retain employment. *Branti v. Finkel,* 100 S.Ct. 1287 (1980). *See also Abood v. Detroit Board of Education,* 431 U.S. 209, 234-37 (1977); *Wooley v. Maynard,* 430 U.S. 705, 714-16 (1977); *West Virginia Board of Education v. Barnette,* 319 U.S. 624, 642 (1943). To compel independent voters who decline to join a party as a matter of principle, to declare an unwanted party affiliation in order to secure the right to vote is no less offensive than the coercion disapproved of in *Elrod* or in *Branti.*

A close corollary to the right to be free of unwanted association is the right to privacy of association. The

public declaration advocated by appellants would, if accepted, plainly infringe the privacy rights of *amici*. *Amici* would then be faced with the impermissible choice between exercising their right of privacy and other constitutional rights, or opting to preserve their privacy by not affiliating. *Speiser v. Randall,* 357 U.S. 513 (1958). This Court has long recognized that privacy of association and other forms of privacy of belief have an inherent value that warrants constitutional protection. *See Buckley v. Valeo, supra,* 424 U.S. at 64-66; *id.* at 237-38 (Burger, C.J., dissenting); *Griswold v. Connecticut,* 381 U.S. 479, 483 (1965); *Talley v. California,* 362 U.S. 60, 64 (1960). Yet there can be little doubt that if appellants prevail, and *amici* ultimately succumb to the declaration requirement by swearing an allegiance they do not feel, publication of a list identifying them with a particular party would invade their right of privacy. For independent voters who have a professional need to maintain public neutrality, such as journalists like Mr. Maraniss, the need to safeguard the right of privacy of political belief is particularly pronounced.

By asking this Court to impose a requirement that independent voters either affiliate with a party or forego voting in primary elections, appellants are effectively seeking to compel *amici* to choose between exercise of their fundamental rights to be free of coerced association and to maintain their privacy of association on the one hand, and their fundamental rights to vote and to associate in support of candidates on the other. This choice is impermissible absent the most "compelling" justifications. *Dunn v. Blumstein,* 405 U.S. 330, 342 (1970).

The justifications advanced by appellants do not meet this exacting standard. As noted above, the crux of appellants' argument is that open primaries infringe the Par-

ty's associational rights, and that the State may not enforce primary laws which in any way impinge upon the Party's rules governing voter eligibility.[7] *Amici* acknowledge that the associational rights of party members protect them from some forms of *governmental* interference. *Cousins v. Wigoda,* 419 U.S. 477 (1975). However, as here, when private associations voluntarily accept public funding for their primaries and their conventions, and link their activities with a state-run function, they surrender their associational rights to the extent that they enjoy the protections and benefits conferred by the government. If the combined actions of government and association deprive others of their constitutional rights, the association itself is subject to the constraints of the Fourteenth Amendment. *Gilmore v. City of Montgomery,* 417 U.S. 556, 575 (1974); *see Norwood v. Harrison,* 413 U.S. 455, 470 (1973); Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity,* 74 Colum. L.Rev. 656, 659 (1974). Thus, at least insofar as their activities touch upon determining voter eligibility, appellants are subject to the requirements of the Constitution.

Appellants' argument also fails to distinguish between the associational interests of the political parties and the governmental interests needed to sustain the closed primary system that they claim the Constitution compels. When a state intervenes to protect and benefit what is alleged to be a private association, it must have a *public* purpose for doing so. As Mr. Justice Brennan cautioned in *Elrod v. Burns, supra,* "care must be taken not to confuse

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[7]Appellants could themselves avoid this problem by not relying on primaries and reverting to privately run and privately funded state caucuses or conventions of party members.

the interests of partisan organizations with governmental interests. Only the latter will suffice [to justify state action]." 427 U.S. at 362. This Court has never held that the government's interest in preserving the existence, influence or composition of the two major parties may be elevated over the fundamental rights of non-members. This Court's decisions upholding statutes which favor the two major parties, or impose burdens on minor parties or independent candidates, have rested on a legitimate governmental interest in maintaining the stability of the election process, not on the hope of preserving the predominance of the Democrats and Republicans.[8]

It is not altogether clear what governmental purpose would be served by excluding independents from primary elections. Appellants contend that closed primaries are needed to shield the parties from intrusion by those with adverse principles. But this concept presumes that it is possible to discern what a party's principles are. As this Court has recognized, the goals and philosophies of the major political parties, especially on the national level, are kept purposely vague and indeterminate in order to attract the widest possible support. *See, e.g., Buckley v. Valeo,*

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[8]Thus, the government may attempt to see that general election winners have the support of a majority or near majority of citizens, that factionalism is not rampant, and that campaign financing flows more readily to those whose messages are more likely to be heeded. *See Buckley v. Valeo, supra,* 424 U.S. at 96; *Storer v. Brown, supra,* 415 U.S. at 733-36; *American Party of Texas v. White,* 415 U.S. 767 (1974); *Bullock v. Carter,* 405 U.S. 134 (1972); *Jenness v. Fortson,* 403 U.S. 431 (1971). But it may not deny minor parties or independent candidates a realistic opportunity to gain access to the ballot or discriminate against legitimate candidates. *Storer v. Brown, supra,* 415 U.S. at 739-40; *Bullock v. Carter, supra,* 405 U.S. at 145-47; *Williams v. Rhodes,* 393 U.S. 23, 31-32 (1968). Nor may it entrench "one or a few parties to the exclusion of others." *Elrod v. Burns, supra,* 427 U.S. at 369; *accord, Williams v. Rhodes, supra,* 393 U.S. at 32.

supra, 424 U.S. at 70; *Rosario v. Rockefeller,* 410 U.S. 752, 769-70 (1973) (Powell, J., dissenting).[9]

Furthermore, appellants do not contend that the Party would even attempt to screen potential voters to ensure that they adhere to the Party's platform or other doctrines. No ideological test or loyalty oath is administered, and no durational requirement is imposed. Yet it is impossible to distinguish between a self-declared Democrat who would be allowed to participate and an independent voter in terms of loyalty to the goals and principles pursued by the Party. Indeed, all that the Party seeks is to force voters to undergo a mechanical process of affiliation which reveals nothing about their true sentiments. For many independent voters, however, the process of public affiliation is hardly mechanical. Reliance on the fact of party affiliation begs the question of whether independents have principles "adverse" to those of party members. If this Court is correct in its observation that "most voters" enroll with a party in order "to gain a voice in the selection process," *Kusper v. Pontikes, supra,* 414 U.S. at 58, then the declaration by itself indicates virtually nothing about devotion to the party or constancy in support of its candidates.

One additional factor counsels rejection of appellants' position. Independent voters are fast becoming the major

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[9] *Amici* acknowledge that appellants' contention may have some merit where it concerns excluding members of opposing political parties from participation. Indeed, the principal thrust of appellants' argument appears to be aimed at excluding members of adverse parties from the Democratic Party primary. *See* Appellants' Brief, at 6 & 22. However, appellants' attempt to sweep independent, non-aligned voters into the same category as partisans is totally unjustified.

segment of the voting public.[10] For a variety of reasons, over the past decade the ranks of independent voters have steadily grown until now 38% to 40% of the voters across the country term themselves independents.[11] That figure almost equals the number of voters who consider themselves "Democrats" and far outstrips the number who call themselves "Republicans."[12] For younger voters, the movement away from the major parties is even more pronounced: 45% of the voters nationwide under 30 years of age are independents.[13]

Two characteristics mark this segment of the electorate. First, the attitudes of contemporary voters indicate that they are more sophisticated politically than the independent voters of earlier years. "They reject the party system consciously as a response to political events, while remaining interested and continuing to vote . . . . [T]he new independence has emerged among the young, well educated, professional voters largely as a response to issues."[14] Second, because of this sophistication, and because voters' political attitudes toward the parties are adopted early in life and become more fixed over time, these voters are

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[10]The figures discussed reflect voter affiliation as of 1974 and are taken from data compiled by the Survey Research Center for Political Studies at the University of Michigan. These studies are analyzed in N. Nie, S. Verba & J. Petrocik, THE CHANGING AMERICAN VOTER 49 (Harv. Univ. Press 1976) ("Nie"), a comprehensive study of American voting behavior. Similar figures are reported in L. Mulcahy & R. Katz, AMERICA VOTES 46 (Prentice-Hall 1976) ("Mulcahy"), and in a study conducted by the Kennedy School of Government, VOTERS, PRIMARIES AND PARTIES 6 (Harv. Univ. Press 1976) ("Kennedy School Study").

[11]Nie at 49; Mulcahy at 46; Kennedy School Study at 6.

[12]Kennedy School Study at 6.

[13]See Nie at 64, Mulcahy at 46.

[14]Mulcahy at 48; *see* Nie at 94-95.

unlikely to surrender their independence for partisanship.[15] Thus, the voters most directly affected by the results of this suit represent a large, distinct group likely to have a continuing influence on the shape of American politics. It is this segment of voters that appellants would exclude from the primary process.

As is clear, appellants' contention launches the purported associational rights of the Democratic Party into a head-on confrontation with the rights of independent voters. *Amici* submit that, insofar as independent voters are concerned, closed primaries are not permitted, let alone required, by the Constitution. Moreover, where, as here, the State has determined that an open primary system best serves the legitimate interests and needs of the State, nothing in the Constitution compels the State, or this Court, to shut the door to the voting booth to independent voters.

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[15]Mulcahy at 48; Nie at 94-95.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the decision of the Supreme Court of Wisconsin should be affirmed and this Court should declare that states are not bound by the Constitution to exclude duly registered voters from participating in state-run, publicly financed and state-mandated primary elections merely because those voters prefer to remain independents and refuse to declare an allegiance to a party.

Respectfully submitted,

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BRIEF FOR AMICI CURIAE

QUESTION PRESENTED

Does the State of Wisconsin's decision not to demand that its citizens publicly declare and record their fealty to the Democratic Party before they may cast their vote for a Democrat in that state's presidential primary unconstitutionally deprive the Democratic Party of its freedom to associate?

STATEMENT OF INTEREST OF AMICI CURIAE

Like Wisconsin, the State of Washington does not require that a citizen publicly declare his affiliation with a party before he is allowed to vote for that party's candidates in a primary election. According to WASH.REV.CODE 29.18.200,

> "[a]ll properly registered voters may vote for their choice at any primary election, for any candidate for each office, regardless of political affiliation and without a declaration of political faith or adherence on the part of the voter."

This system was created by the people through the initiative process and has since enjoyed the support of an "overwhelming" majority of the citizens of Washington. *See* Ogden, *Washington's Popular Primary,* Research Studies of the State College of Washington 139, 144 (Sept. 1951). The statute encourages broad voter participation and lessens the control over the nominating process by small, but disciplined cadres of party professionals. The Supreme Court of Washington recently held that this statute does not unconstitutionally restrict the freedom of association guaranteed by the First and Fourteenth Amendments. *Heavey v. Chapman,* 93 Wash.2d 700, 611 P.2d 1256 (1980).

Although Washington does not have a presidential primary, the Wisconsin and Washington primary election statutes serve similar interests and have been subjected to similar challenges on associational grounds. *Cf. Heavey v. Chapman, supra.* The interest of the State of Washington in this action stems from its interest in preserving its own popular and smoothly functioning method of conducting primary elections.

The people of Montana are traditionally independent minded, particularly with regard to their political beliefs. Montana has a long tradition with the "open primary" system. Montana allows its citizens to vote in primary elections without a public declaration of party affiliation. Electors do not register by party. However, under the provision of Section 13-10-301(2), MONT.CODEANN., elec-

tors may choose from the candidates of only one political party at a single election. The election procedures insure that a voter cast his ballot in only one party primary.

Montana does have a presidential primary. However, Section 13-10-407, MONT.CODEANN., provides that the use of the primary results are discretionary with each political party. In other words, the method of selection of delegates to national presidential nominating conventions is set by party rules. Like Wisconsin, in 1980 the Democratic Party in Montana based its delegate selection process on the results of the primary, a policy which violates the rules of the Democratic National Committee at issue here.

This brief is submitted by amici curiae in support of the position of the State of Wisconsin.

SUMMARY OF ARGUMENT

The open primary, instead of imposing a burden on freedom of association, in fact enhances that freedom to a much greater extent than does the closed primary. The open primary preserves the secrecy of the ballot, encourages participation in primary elections, and guarantees the right to cast a meaningful vote to the independent voter far more completely than does the closed primary. Forsaking the open primary in the name of freedom of association, in addition to being self-contradictory, would resurrect a trend towards restriction of the franchise not seen since the days of the all-white primaries.

In determining whether or not a statute unconstitutionally deprives persons of freedom to associate, this court has devised a test in which the burdens imposed by the statute are balanced against the interests it serves. When the burden is substantial, the interests must be compelling. When the burden is less than substantial, the statute need only serve legitimate state interests; that is, minimal scrutiny is typically employed. And, where the party challenging the statute has not shown a substantial burden on association, the burden of persuasion to show a lack of a legitimate state interest rests with that party.

This court has consistently refused to hypothesize or

speculate upon possible burdens a statute might place upon freedom of association. The more absolute and the more clearly actually in operation a burden is, the more substantial it is. According to appellant's brief, the open primary infringes upon their freedom to associate in that it allows adherents of other parties to foist the weakest candidate off on them. However, appellant's brief contains no evidence that this "raiding" actually takes place. Indeed, the available evidence indicates that raiding, if it takes place at all, is of such inconsequential dimension as to have little, if any, effect on the outcome of an election. Any burden on freedom of association is trifling, if not wholly speculative. Under no circumstances can it be styled as substantial.

On the other hand, the interests served by the open primary are of the utmost import. The open primary protects the privacy of the citizen's political beliefs and affiliations. It preserves the independent voter's right to vote. It encourages thoughtful, discriminating voting and allows the voter to choose the candidate he thinks is best qualified. The interests served by the open primary are of the most enduring and fundamental nature. The burden allegedly imposed by the open primary on freedom of association is of the most conjectural and trivial nature. The open primary is constitutional.

ARGUMENT

I. Freedom of Association Is Served Better by an Open Primary Than by a Closed Primary.

It is ironic that the open primary should be attacked as an impermissible restraint on the freedom of citizens to associate with the political parties and candidates of their choice. It is doubly ironic that this attack should come from a party which in the past decade has made great strides in opening up its processes to full citizen participation.

The open primary emerged in the first part of this century as one of the most uncompromised expressions of

the drive toward citizen, rather than boss, control of the political processes. *See* Ranney, *Curing the Mischiefs of Faction* 18, 80-81 (1975). Where participation in a closed primary is restricted to party regulars, those who are fervent enough in their loyalty to a party publicly to enroll in that party, an open primary allows every voter to follow the dictates of his convictions, with no strings attached. Where the closed primary effectively disenfranchises those who do not want their political beliefs made a matter of public record, the open primary allows the citizen, if he so desires, to preserve the secrecy of his political beliefs, a right which surely lies at the core of any democratic system. Where the closed primary effectively denies the growing legion of independent voters any real voice in primary elections, the open primary grants the independent full access to the polls at this critical stage in the selection of those who will govern. And, finally, where those who stand most to benefit from the closed primary are a small group of party leaders and professionals desiring to solidify their power base, those who benefit from open primaries are, quite simply, concerned voters to whom partisan politics represents a chance to be heard but not a career.

The open type of primary thus preserves, to a much greater extent than does the closed primary, the freedom of citizens to associate for political purposes. It is, paradoxically enough, this open primary system which, in the name of freedom of association, is being assaulted in this action by proponents of the closed primary.

The ironies, however, do not stop at this point. Our research has disclosed no decision by this court which has overturned a state elections system because it allowed too much voter participation. Yet that is precisely what the appellants herein are demanding. Moreover, ever since the malignant all-white primary schemes of certain states were invalidated in the White Primary Cases, *see, e.g., Smith v. Allright*, 321 U.S. 649 (1944), the decisions of this court have described a trend toward ensuring full citizen participation in the electoral processes. A decision by this court that the First Amendment mandates adoption of the

restrictive closed primary, if any type of primary is to be had, would go far in reversing this laudable trend.

The long-range effects of the relief demanded by appellants must also be examined. If a state desiring to hold a primary may not prevent a political party from requiring enrollment as a prerequisite to participating in that primary, what is to prevent a party from requiring in addition a statement of allegiance to the party's principles or platform? The very notion of imposing ideological qualifications on the exercise of the franchise is abhorrent to every concept of democracy. Yet that is the Pandora's Box which a reversal of the decision below is bound to open.

To assert that the First Amendment requires discarding the open primary is to ignore the spirit of that Amendment, as well as the decisions construing it. Freedom of association is served much more fully by the open primary than by the closed primary.

II. Wisconsin's Open Primary Statute Does Not Impose a Substantial Burden on Appellant's Freedom of Association.

An analysis of whether Wisconsin's open primary unconstitutionally deprives appellants of their freedom to associate must begin with an examination of what, if any, burdens the open primary statute actually imposes on that right. This court has consistently looked for a "substantial burden" on associational rights before striking down state law. *See Marchioro v. Chaney*, 442 U.S. 191, 199 n.15 (1979); *NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958); *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960); *Cousins v. Wigoda*, 419 U.S. 477, 488 (1975). Words like "substantial", however, are not written on litmus paper. The standards to be used in determining how substantial a burden Wisconsin's open primary actually places on freedom of association can best be gleaned by surveying other election statutes which have already been subjected to associational challenges.

A striking feature of election statutes which have

fallen on associational grounds is that the burden on association has been actual and direct. This court has consistently and rightly refused to speculate on or hypothesize possible burdens on association. For instance, the Ohio statutes stricken in *Williams v. Rhodes,* 393 U.S. 23 (1968), made it "virtually impossible" for a new party to be placed on the ballot in a presidential election. *Id.* at 24. The law which fell in *Kusper v. Pontikes,* 414 U.S. 51 (1973), "locked" the voter into his preexisting political affiliation in such a way that to change parties the voter had to forego voting in any primary for nearly two years. *Id.* at 61. A similar pattern may be seen in election statutes which have perished on the razor's edge of equal protection due to a disparate effect on, among other rights, the freedom to associate. See *Dunn v. Blumstein,* 405 U.S. 330 (1972); *Kramer v. Union Free School District,* 395 U.S. 621 (1969); and *Harper v. Virginia Bd. of Elections,* 383 U.S. 663 (1966). A common thread in all these defective statutes is that the burden imposed on association is actual, in that there is no question but that it exists, and absolute, in that a key component of association, voting or getting on the ballot, is denied. A commentator cast this point in even stronger language:

> "* * * associational analysis ordinarily has been applied when states have acted to deter individuals from joining or attending meetings of a group * * *"

Developments-Election Law, 88 HARV.L.REV. 1111, 1166 (1975).

In contrast to the above pattern are those election statutes which have survived freedom of association challenges. As in *Kusper v. Pontikes, supra,* the law challenged in *Rosario v. Rockefeller,* 410 U.S. 752 (1973), prescribed a time limit within which a voter had to enroll in a party in order to vote for that party's candidates in a closed primary. Unlike the statute in *Kusper,* the *Rosario* statute was upheld. "The basic difference," this court said, "was obvious." The law in *Kusper* "absolutely precluded" the voter from participating in a primary. The law in Rosario did not. *Kusper v. Pontikes, supra* at 60. A similar

distinction was used in upholding the challenged statute in *Jenness v. Fortson,* 403 U.S. 431 (1971). Like the statute which succumbed in *Williams v. Rhodes, supra,* the law at issue in *Jenness* imposed requirements which third parties had to meet before getting on the ballot. The *Jenness* court concluded, however, without even discussing possible state interests, that "[w]e can find in this system nothing that abridges the rights of free speech and association * * *" *Jenness v. Fortson, supra* at 440. The distinction with *Williams* was simple: "* * * Georgia's election laws, unlike Ohio's, do not operate to freeze the political status quo." *Jenness v. Fortson, supra* at 438. The barrier to association in *Williams* was absolute; in *Jenness* it was not.

This survey of cases points out the elements which enter into a determination of whether a burden on associational rights is "substantial" or not. The more absolute and the more clearly actually in operation an infringement on association is, the more substance there is to it. Inversely, the more indirect and speculative an infringement is, the less substance it has. Indeed, *Jenness v. Fortson, supra,* seems quite plainly to stand for the proposition that if a burden on association, although actual, may be overcome through reasonable effort (and assuming the burden is rationally related to some legitimate state interest), the inquiry is over, and the burden is constitutional. *Id.* at 439-440.

The alleged burden placed by Wisconsin's open primary on the Democratic Party's ability to associate, when judged against the above standards, whithers away to something of very little substance indeed. According to Appellant's Brief, the burden on association lies in the fact that Wisconsin law allows voters who are not willing publicly to declare their fealty to the Democratic Party, that is, those who are not party regulars, to vote for a Democrat in the presidential primary. Brief for Appellant at 25-32. The Party quotes statistics purporting to show extensive participation in the Democratic primary in Wisconsin by so-called crossovers. Brief for Appellant at 30-31. What these statistics do not show, however, is the reason for the crossing over.

There are many reasons why a citizen wishing to vote for a Democrat may not be publicly affiliated with that party. First, the voter may be a strong Democrat who simply wants to keep his political beliefs a private matter. Or, he may be a strong Democrat who just hasn't gotten around to registering with the Party. The voter may be a non-Democrat who thinks that a Democratic candidate is best qualified. Or, finally, the voter could be an adherent of another party who wants to foist the weakest candidate off on the Democrats. In the first two situations, there is absolutely no infringement on any right to associate. Indeed, this right will be enhanced by ensuring that the Party hears the voice of all its adherents. The third situation represents little, if any, threat to association since each major party embraces such a wide range of opinion and a candidate who appeals to such relatively unattached voters may well be the stronger one. Ogden, *Washington's Popular Primary,* Research Studies of the State College of Washington, 148 (Sept. 3, 1951).

It is only in the last situation, the classic case of raiding, where an open primary could represent an actual and direct burden on association. The commentaries, and common sense, however, both indicate that raiding is a very rare phenomenon. First of all, raiding will, in all probability, only take place when the result in the raider's own primary is a foregone conclusion. One who is committed enough to party politics to raid will surely have a favorite in his own primary if there is any contest. The statistics back this up. In a state-wide poll conducted in Washington State by the Washington Public Opinion Laboratory, only 3 percent of those responding said they might engage in raiding. Ogden, *supra* at 147. This survey concluded that

> "[raiding] probably is rejected by the people * * * as a tactical weapon. * * * Statistical evidence * * * strongly indicates that [raiding] is not a weapon which has ever been used deliberately and successfully on a state-wide basis * * *"

Id. at 160. A more recent study confirms this conclusion:

> "Although there are documented cases of organized raiding [citing no cases after 1950], the recent decline of party machines capable of inducing their members to raid and the absence of durational requirements in many states suggest that the likelihood of raiding may be overstated."

Developments-Election Law, 88 HARV.L.REV. 1111, 1173 (1975).

Any burden imposed on freedom of association by an open primary is thus speculative, since no evidence of actual raiding has been proffered, and, far from absolute, since if any raiding does occur, it is so rare and of such trifling dimension as to have only a miniscule effect on the outcome of an election. A burden as ephemeral as this cannot, in light of the decisions of this court, be characterized as substantial.

III. The Open Primary Serves Sufficiently Important State Interests to Justify Its Negligible Impact on Freedom of Association.

This court has not developed any single, formulistic test for determining whether election laws unconstitutionally deprive citizens of their freedom to associate. When faced with statutes imposing severe burdens on the ability to associate, the court has required that the statutes serve a "compelling" state interest, *Williams v. Rhodes, supra* at 31, and that the means chosen to serve that interest be the least drastic alternative, *Kusper v. Pontikes, supra* at 59. However, where the burden is less severe, a more relaxed standard is employed. For example, in *Rosario v. Rockefeller, supra* at 762, the court required only that the burden on association be "tied to a particularized legitimate purpose, and [be] in no sense invidious or arbitrary." The rule of decision emerging from these cases was perhaps best summarized in *Storer v. Brown,* 415 U.S. 724, 730 (1974):

> "Decision in this context, as in others, is very much a 'matter of degree,' * * * very much a matter of 'consider[ing] the facts and circumstances behind the law, the interests which the state claims to be

> protecting, and the interests of those who are disadvantaged by the classification.' "

Moreover, the *Storer* opinion suggests that, at least in cases where the burden placed on association is not as absolute or severe as in cases like *Williams v. Rhodes, supra,* or *Kusper v. Pontikes, supra,* the burden of persuasion will be placed on the party challenging the statute. That is the plain import of the *Storer* court's observation that

> "Nor do we have reason for concluding that the device California chose * * * was not an essential part of its overall mechanism to achieve its acceptable goals."

Storer v. Brown, supra at 736. Accord, Note, 53 N.C.L. REV. 430, 436-437 (1974).

The burden on association represented by an open primary is miniscule, p. 8-10, supra. Therefore, the open primary should be subjected to a very relaxed standard of scrutiny. *Storer v. Brown, supra* at 736. Indeed, *Jenness v. Fortson, supra* at 440, suggests that such a light burden will survive if shown to be rationally related to a legitimate state interest. An open primary statute more than meets that standard.

As summarized in Part I. of this brief, the interests served by an open primary lie close to the core of our democratic system.

> "This court has recognized the vital relationship between freedom to associate and privacy in one's associations. * * * compelled disclosure of affiliation with groups engaged in advocacy may constitute [an effective] restraint on freedom of association * * *"

NAACP v. Alabama, supra at 462. In an open primary, the voter is not compelled to disclose his affiliation with a party before he is allowed to vote for that party's candidate. Thus, the open primary protects the privacy of one's political beliefs, an interest central to our democratic system. The closed primary, on the other hand, faces the voter with the Hobson's choice of disclosing political affiliations which he might rather keep private, or not voting at all. The open primary serves the vital state

interest of preserving the secrecy of the ballot. The closed primary only compromises that interest.

The second great interest served by an open primary is the preservation of the right to vote of the independent voter. This court recognized as far back as 1973 that

> "[p]artisan political activities do not constantly engage the attention of large numbers of Americans, especially as party labels and loyalties tend to be less persuasive than issues and the qualities of individual candidates."

Rosario v. Rockefeller, supra at 771. (Powell, dissenting). The Presidential campaign of 1980 has driven home even more clearly the increase in the number of independent voters. Accord, Comment, 1977 So.Ill. L.J. 210, 232. In a closed primary the independent cannot even vote unless he publicly declares himself to be something he is not, a party adherent. If the independent declines to engage in such a falsehood and if the general election is uncontested (something which does not happen in Presidential races but which is far from rare on the state and local level), the independent will be totally disenfranchised. And, even if the general election is contested, the independent still will be shut out at the primary election, which this court has deemed just as critical a stage as the general. See *U.S. v. Classic*, 313 U.S. 299, 318 (1941). The right to vote is "a fundamental political right * * * preservative of all rights." *Dunn v. Blumstein, supra* at 336. An open primary guarantees that right, and the right freely to associate, to the independent voter to an extent the closed primary cannot come near. If any state interests may be deemed compelling or vital, these are surely two.

Two other less important, but certainly legitimate interests served by the open primary are that it encourages thoughtful, discriminating voting and allows the voter, at least to a greater extent than does the closed primary, to vote for the candidate who best reflects his views. See *Rosario v. Rockefeller, supra* at 769 (Powell, dissenting).

The open primary not only enhances the seminal interests of freedom of association and the right to vote, but does so in concert with one of the central balances of

our federal system. The prime responsibility for the regulation of federal elections is vested in the states.[1] See *Williams v. Rhodes, supra* at 29; and *Storer v. Brown, supra* at 729, 730.

The states have exercised this authority to regulate elections by evolving

> "comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates."

Storer v. Brown, supra at 730. The open primary represents the exercise by the states of one of their critical functions under our federalism in a way which enhances freedom of association, a constitutional limitation on state action. The open primary shows that federalism works. It must not be discarded.

To a much greater extent than does the closed primary, the open primary protects freedom of association and the right to vote, state interests of a most momentous weight. The burden placed on freedom of association by the open primary is negligible. Under the balancing test developed by this court, the open primary is constitutional. *See* 88 HARV.L.REV., *supra* at 1210.

IV. The Open Primary Is Consistent With the Result in *Cousins v. Wigoda.*

The appellants assert that *Cousins v. Wigoda, supra,* of itself, is dispositive of this entire case and requires that the open primary be scrapped. (Brief for Appellant at 20). Judicial decisions are not made in a vacuum and should not be so read. *Cousins* is but one case in a well-developed body of law relating to associational challenges to election laws. As demonstrated up to this point, the open primary is consistent with this body of law. Appellants, however,

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[1]It need hardly even be mentioned that the nearly exclusive authority to regulate *state* elections is vested in the states. See, 88 HARV. L. REV., supra at 1210-1211.

would have the court read *Cousins* as the death knell of the open primary: an interpretation radically at odds with the mainstream of this fund of decisions. Such a strained reading should be avoided. *Cousins* must be read as complementing its forebears, rather than revolutionizing them.

The *Cousins* opinion "emphasized" that its holding related only to "the qualifications and eligibility of delegates." *Cousins v. Wigoda, supra* at 483 n. 4. Delegate "qualifications and eligibility" is potentially a very broad field which could be affected by nearly any election regulation a state chose to adopt. However, the type of delegate qualifications actually at issue in *Cousins* were of a very circumscribed sort. The party guidelines which were found to take precedence over state law required written rules to be in effect, adequate public notice and participation in slate-making, a certain timing of delegate selection, and better representation of women and minority groups. See *Id.* at 479 n. 1, and Hearing Officer's Report, Democratic Nat'l Party, June 25, 1972. These guidelines dealt with the processes by which the individual persons who might serve as delegates were chosen. They did not deal with the mechanism by which the delegation most responsive to the will of the voters would be chosen, the function of the open primary. *Cousins* is simply not on point in an analysis of the open primary. As a commentator has stated,

> "*Cousins* should not * * * be read necessarily to invalidate state regulation of the procedures by which parties select candidates for state office or delegates to the national conventions."

88 HARV.L.REV., *supra* at 1210.[2] Moreover, if *Cousins* has any relevance here, it is in support of the open primary:

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[2] *Cousins'* inapplicability to primary elections for state office is even more certain:

> "* * * *Cousins* should not be read to upset earlier state court decisions requiring state parties to conform to state laws regulating the nomination of candidates for state office * * *"

88 HARV.L.REV., *supra* at 1211.

> "[t]he Democratic Party's 1970 guidelines [those at issue in *Cousins*] were promulgated as an expression of the ideological decision to broaden the participation in the nomination process * * *"

Note, 62 GEO. L.J. 1621, 1630 (1974). That is precisely one of the key aims of an open primary.

Furthermore, "[t]he emphasis in *Cousins* was on the interstate implications of the Illinois statutes." Note, 14 WILLAMETTE L.J. 259, 266 (1978). The court wanted to avoid the crazy-quilt result from giving each state a veto power over a national party's internal policy decisions, such as the decision to expand its base. *Cousins v. Wigoda, supra* at 490. The argument that the open primary would open a similar Pandora's Box would apply only in Presidential elections, and then only if raiding was shown to be systematic and widespread. The evidence, however, indicates just the contrary.

Finally, and most simply, *Cousins* may be distinguished here in the same manner in which it was distinguished in *Marchioro v. Chaney, supra* at 199 n. 15. In *Cousins* there was a substantial burden on the party's associational freedoms. Here there is none.

The considerations which informed this court's decision in *Cousins*, then, do not apply to an open primary. *Cousins* may most easily be read, consistently with the other cases discussed herein, as permitting an open primary.

CONCLUSION

The First Amendment's guarantee of freedom of association cannot be read to require the invalidation of the open primary, a type of primary which enhances that very freedom to a far greater degree than does the closed primary. In addition to being logically inconsistent, an invalidation of the open primary on associational grounds would needlessly upset a central balance of our federal system and would resurrect a trend toward restricting the franchise, a trend which has not been seen since before the demise of the all-white primaries decades ago.

Wisconsin's open primary imposes at most a speculative and inconsequential burden on freedom of association. The open primary enhances freedom of association to a vastly greater degree than it burdens that freedom. The other interests served by the open primary, such as protecting the right to vote, are also vital to the smooth running of a democratic system. Under the balancing test developed by this court, it could soundly be argued that an open type primary is required by the First Amendment. At the very least, the open primary is permitted by that Amendment.

The decision below of the Supreme Court of Wisconsin should be affirmed.

Respecfully submitted,

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